

Journal of Halacha and Contemporary Society

Number LVI

Color PMS207

Published by
Rabbi Jacob Joseph School

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Journal Of Halacha and
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**Published by
Rabbi Jacob Joseph School**

**Rabbi Alfred S. Cohen,
Editor**

The Journal of Halacha and Contemporary Society

Number LVI

Succot 5769

Fall 2008

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The Journal of Halacha and Contemporary Society is published twice a year by the Rabbi Jacob Joseph School whose main office is at 3495 Richmond Road, Staten Island, New York, 10306. We welcome comments on the articles included in this issue and suggestions for future issues. They should be sent to the Editor, Rabbi Alfred Cohen, 5 Fox Lane, Spring Valley, New York 10977.

Manuscripts that are submitted for consideration must be typed, double-spaced and on one side of the page and sent in duplicate hard copy to Rabbi Cohen. Each article will be reviewed by competent halachic authority. In view of the particular nature of the Journal, we are especially interested in articles that concern contemporary halachic issues.

More generally, it is the purpose of this Journal to study through the prism of Torah law and values major questions facing us as Jews in the twenty-first century. This encompasses the review of relevant biblical and talmudic passages and the survey of halachic literature, including recent responsa. Most importantly, the Journal of Halacha and Contemporary Society does not present itself as the halachic authority on any question. Rather, the aim is to inform the religious Jewish public of positions taken by respected rabbinic leaders over the generations.

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Birkat Hachamma

Rabbi Alfred Cohen

A major goal of Judaism is to have a person be cognizant at all times of the greatness of G-d and to give thanks to Him for the awesome world He created for our benefit and use. In *Mishlei* it says *bechol derachecha da'eihu*, which means one should be aware of G-d at all times.¹ Thus, our rabbis instituted many blessings and prayers to be recited, not only daily but on special occasions, to remind the individual not to take for granted the bounties with which we are blessed. Towards that end, there are blessings to be recited upon the New Moon, upon seeing the trees bloom in the springtime, upon seeing the ocean after a long interval, upon viewing an extraordinary wonder of nature.

One of the most unusual of these blessings will be recited this coming year—the *birkat hachamma*—the blessing for the sun, which mitzvah occurs only one time in 28 years. Briefly, this blessing is recited at the time that the sun returns to the same position, at the same time of day, and on the same day of the week, where it was at the time of Creation.² That

1. *Mishlei* 3:6; the Artscroll edition of *Berachot* 59b has some valuable footnotes.

2. The Torah records that the celestial bodies were created on the fourth day of Creation, a Wednesday; the rabbinic premise is that the sun was created at the very beginning of the fourth day, at 6 PM of the evening which starts the day; in other words, at 6PM on the first Tuesday evening. The precise time when the sun returns to its original position in the heavens in relation to the stars (constellations of the zodiac) advances 6 hours each year—from 6 PM to midnight to 6 AM to noon. Thus, after 4 years, the sun will again be in its original position at 6 PM, but this time it will be on a

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phenomenon will take place this year on Tuesday, April 7, 2009, and the *birkat hachamma* is recited the following morning,³ April 8, 2009, which this year coincides with the 14th of Nissan, *erev Pesach*.

Since this mitzvah occurs so seldom, most people are not conversant with the particulars of its performance. In this study, we will review the pertinent halachot and try to indicate the proper procedure to follow in fulfillment of this rare mitzvah.

The complete cycle of the sun's travel through the celestial constellations until it returns to its exact position on the same day of the week is called *tekufat haChamma* (the sun cycle), and the Mishnah briefly directs:

Haroeh chamma bitekufata...omer "baruch oseh [ma'aseh] bereishit",⁴ whoever sees the sun at [the beginning of] its

different day of the week, and 4 years later it will again be at 6PM, but on another day of the week, and so on. Consequently, it takes the sun 28 years (7 [days of the week] times 4 [possible times of day]) to return to its original position at the same time and on the same day as Creation. For elaboration of the astronomical calculations and rabbinic discussions thereof, see *Bircas Hachamma* by Rabbi J. David Bleich, Mesorah Publications, 1980, and *Idem*, "Birkat Ha-Hammah: An Alternate Date?", *Tradition*, Spring 1981, pp. 80-83.

The author of *Kaf HaChaim* in 229:6, also discusses the halachot of *birkat hachamma*; in the course of that discussion, he notes that there is a rabbinic controversy whether the world was created in the spring (Nissan) or at Rosh Hashanah (Tishrei), and how that debate affects performance of *birkat hachamma*. The author of *Shiurei Knesset Hagedolah*, 229:2, writes that in his country they did not always recite *birkat hachamma*, based on the interpretation of the *Aruch* that *birkat hachamma* should be made when one has not seen the sun for three days due to clouds. Obviously, this is not our practice, as discussed by *Yechave Da'at* IV:60, note 2. See the *Yerushalmi Berachot* 9:2, and *Shu"t Chatam Sofer Orach Chaim* 56.

3. Rambam suggests that the reason for waiting until the next morning to recite the *beracha* may be that that is when the sun started to shine. See also *Chazon Ish, Orach Chaim* 138:1.

4. *Berachot* 59b. However, some talmudic texts cite the Mishnah as directing the blessing to be "*oseh bereishit*", omitting the word *ma'aseh*. Most texts, however, do cite the blessing with the additional word, and that is

cycle...should say, “blessed [are You] who makes [the work of] Creation.”

[Here the Gemara comments]...And when does this happen? Abaye said, “Every twenty-eight years, and afterward [the cycle] begins again, and the *tekufa*⁵ of Nissan falls [in the hour] of Shabtai (Saturn), on the evening of Tuesday, the night before Wednesday.”

It is somewhat jarring to read the talmudic text of the blessing as “blessed is [the One] who makes [the work of] Creation”, omitting the Name of G-d and mention of His kingship (*shem umalchut*), inasmuch as there is an accepted principle⁶ that “any blessing without *shem umalchut* is not a blessing!”⁷ In the *Shulchan Aruch, Orach Chaim* 229:2 the mitzvah is recorded as: “Whoever sees the sun at [the beginning of] its cycle, which is every 28 years, at the onset of the eve of the fourth day [i.e., Tuesday evening]...in the morning [thereafter] he recites ‘blessed [are You] who makes [the work] of Creation.’” *Baruch ata Adon-ai, Elo-heinu Melech Ha-olam, oseh ma’aseh bereishit.*”

Cloudy Day

After waiting 28 years to recite the blessing, what does one

how R. Ovadia Yosef rules it should be recited; see *Yechave Da’at* IV:18, note 1, for additional sources.

5. For a discussion of the anomalies of the Jewish calendar vis-à-vis astronomical phenomena such as the vernal equinox, see the *Appendix* to *Masechet Berachot* of the Schottenstein Edition, Artscroll Gemara.

6. See *Rosh, kella* 4:3; *Chida, Machzik Beracha* 229:11.

7. *Berachot* 40a, *Orach Chaim* 214. One exception is found in the Ramo to *Orach Chaim* 225:2, who rules that when a boy reaches the age of bar mitzvah, the father should make the blessing, “Blessed is the One who has released me from [incurring] punishment for this one.” Here, too, the blessing does not include the Name and kingship. However, the Gra’s version does include *shem umalchut*. (When my son reached that age, Rav Gustman z”l instructed me to make the blessing with *shem umalchut*, which of course I did).

do if it is a rainy or cloudy day when the time comes around? After all, both the Gemara and the *Shulchan Aruch* specify, "One who sees the sun at its cycle....." If one cannot see the sun, is it sufficient to know that somewhere out there beyond the clouds, the sun is reaching a critical juncture in its journey through the heavens, and therefore recite a blessing on the phenomenon?

In truth, there is not much written on this specific mitzvah, since it occurs so seldom. However, it is possible and perhaps legitimate to draw an analogy from the far more common occurrence of *kiddush levana*, blessing the new moon early in its cycle. When he was queried about reciting the prayers and blessing on the new moon if it was not visible, Radvaz did not merely answer yes or no.⁸ Rather, he analyzed the nature of the blessing: does one make a blessing to thank the Almighty for the pleasure he derives from the bright light of the moon, whose illumination helps him distinguish coins and avoid physical pitfalls, or is one reciting the blessing in acknowledgement of the wonders of nature (*minhago shel olam*), of which one is cognizant even if at this particular moment one does not derive direct benefit thereof? Radvaz concludes that since the Talmud employs the specific term "*haroeh*", "one who sees the moon when it is new [makes a blessing]", then when one cannot see the moon at all, one cannot bless; however, if the moon is only covered with a thin veil of clouds, the blessing is said.⁹

Based on this, Rav Ovadia Yosef rules that if the sun is totally hidden, one may not recite the *birkat hachamma*; however, if there is only a cloudy haze obscuring the visibility, one may recite the blessing. Nevertheless, he also cites alternate opinions disagreeing with his ruling. The rationale there is that the blessing is based on our awareness that the

8. *Shu"t Radvaz* I:341; *Chatam Sofer* 56.

9. If the moon was visible when one started making the blessing but then was obscured by clouds, one may complete the *beracha*.

sun is vital in illuminating the world and the fact that it has returned to its original place in time and place of Creation is a significant event.¹⁰

He mentions instances of great rabbis who did recite the blessing¹¹ even though clouds prevented the sun from being seen.¹² Rav Yosef concludes with the observation that if, due to clouds, one recited the blessing in the morning without pronouncing the Name of G-d or His kingship (*shem umalchut*), and subsequently the sun became visible, it is advisable to recite the blessing once again, this time with all the praises of the Almighty included.¹³

If the sun's being obscured is problematic, what should a blind person do, who cannot see the sun at all? Since the Mishnah says "one who sees the sun in its original position..." does that mean the person reciting *birkat hachamma* has to see the sunlight, or is it enough to know the sun is in the sky? Of

10. *Panim Me'irot* 2:38.

11. However, they recited the blessing without including the Name of G-d or mention of His kingship, based on the view of the Ra'avad who maintains that this category of blessing should never include the Name and kingship. See, however, *Chochmat Shlomo* 229, *Yehudah Ya'aleh Orach Chaim* 7 as well as many others noted in Note 9 of *Yechave Da'at*, p. 99., who all dismiss the opposing view of Ra'avad as not being the normative position. See also *Sha'arei Teshuva Orach Chaim* 229:1.

12. *Mishnah Berurah* 229, note 8, notes that the *Sha'arei Teshuva* maintains that one should wait until midday, in case the sky clears up; if it does not, he may make the full blessing anyway.

13. This option is rather controversial: we have noted above that in the view of the Ra'avad one should never recite the blessing with *shem umalchut!* Consequently, the person has already fulfilled the mitzvah, at least minimally, by reciting an abbreviated blessing; how can he now make another (unnecessary) blessing? See note 10 *Yechave Da'at*, *ibid*. However, the *Shulchan Aruch* 214 basically rejects the position of Ra'avad; in the view of the *Shulchan Aruch*, a blessing without the Name and kingship of G-d is not a blessing, and therefore he rules that the blessing needs the full complement of Divine attributes. Rav Frank in *Mikraei Kodesh, Yomim Nora'im*, p. 88, discusses the option of reciting the *birkat hachamma* tentatively (*al t'nai*).

course, the entire world benefits from the sun's benevolence, and even if a person cannot see the sunlight, he can understand the significance of the sun's returning to its position. Moreover, even the blind person benefits from the sun's light, by the fact that other people can see pitfalls and warn him to avoid them.¹⁴

Shehecheyanu

There is an accepted rule that when a mitzvah presents only rarely, one should make a blessing *Shehecheyanu* in addition to the blessing recited for the mitzvah itself. Thus, when we recite kiddush on a Festival, or when eating a new fruit, the blessing *Shehecheyanu* is also made, thanking G-d for giving us the opportunity to perform the mitzvah.¹⁵ Should one therefore recite the *Shehecheyanu* blessing after reciting *birkat hachamma*, which is about as rare a mitzvah as one can

14. An interesting ancillary question is the topic of considerable discussion among *poskim*—whether seeing through a window or through eyeglasses qualifies as “seeing” within the context of a mitzvah. The debate starts with a text in *Berachot* 25b, that it is improper to recite the *Shema* in the presence of an *erva* (an exposed part of the body which is supposed to be covered). The Gemara interprets this to mean that one must see the forbidden *erva*, inasmuch as the biblical verse says “An *erva* should not be seen in your midst.” See comments of *Torah Temimah Devarim* 16:9 note 42. On the basis of this talmudic teaching, the Rashba in his comments to *Berachot* 53b writes that one must see the light of the havdala candle on Saturday night—but if he views it through a window, it is nevertheless acceptable. Similarly, one may recite the *Shema* while reading the words wearing glasses. And *Sha'arei Teshuva* 426 rules that one may recite the blessing on the New Moon even when viewing it through a window. Based on these precedents, it would seem that the same rules would apply to *birkat hachamma*. See *Yabia Omer* I:7 and IV:40, where Rav Yosef differentiates between seeing something while looking through eyeglasses and seeing the reflection of the moon in water (as discussed in the Gemara *Rosh Hashanah* 24). He explains that glasses restore one's vision to its original accuracy, but seeing the reflection of an object in a mirror is not the same as seeing the object itself.

15. The blessing *Shehecheyanu* is not recited when one blesses the new moon, inasmuch as this occurs monthly, and *Shehecheyanu* is only to be recited when the blessing is more than 30 days since the last time.

encounter?

For a variety of reasons, the answer is “no”. A verse in Isaiah (30:26) prophesies that in the messianic age, the light of the moon will be congruent to the light of the sun, and the light of both of them will increase sevenfold, “as in the seven days [of Creation]”. This prophecy is generally taken to mean that the celestial bodies’ light was diminished, due to the sins of mankind. When we recite blessings on the moon and the sun, therefore, we are reminded of our own culpability in diminishing their radiance, and our failure to remedy their lack by doing *teshuva*. Inasmuch as this realization is not an occasion of joy, it is not proper to make the blessing *Shehecheyanu*.

Most *poskim*¹⁶ attribute the decision that *Shehecheyanu* should not be recited to a more mundane rationale: there is no change discernible to the eye in the sun’s appearance or movement. *Shehecheyanu* is recited when something new happens – a holiday, or one eats a new fruit – but in this instance, no one can visually detect anything new. Thus, we recite the blessing for the sun’s renewal due to our knowledge that indeed this landmark has been reached, but since that phenomenon is not actually perceived by the individual, it is not appropriate to recite the blessing.

Yet, since it does seem counterintuitive not to express how thrilled we are to be able to make this special blessing, Rav Ovadia Yosef suggests that “there are those who have the custom that at that moment, [of making *birkat hachamma*], they don a new garment and recite *Shehecheyanu*.¹⁷ This expedient is similar to the practice on Rosh Hashanah—since we recite

16. Maharam Schick, *Orach Chaim* 4; *Yechave Da’at*, IV 18, note 6. Interesting is the fact that when making a blessing on seeing fruit trees blossom in the spring (*birkat ilanot*), which was instituted specifically because it is a phenomenon which occurs only once a year, no *Shehecheyanu* is recited. See *Shita Mekubetzet*, *Berachot* 43b.

17. “*Safek Berachot lehakel*”, *Yechave Da’at*, IV 18, note 4.

the *Shehecheyanu* on blowing the shofar on the second day, although we already recited *Shehecheyanu* upon the blowing of the first day, it is customary to wear new clothes, so that the *Shehecheyanu* can apply to that as well.¹⁸

Women

A general principle of Jewish law holds that women are exempt from positive biblical commandments which are time-occasioned. Thus, for example, women are exempt on a biblical level from sitting in a sukkah, which mitzvah exists only on the holiday of Sukkot. For the same reason, women are not required to wear *tzitzit*, which are only donned in the daytime ("and you shall see them").

Despite the general exemption of women from time-occasioned mitzvot, in the eyes of some authorities this is not a categorical principle, and there are times when women may participate in such mitzvot, although there is disagreement about their making a blessing.

In general, Sephardic authorities do not favor a woman's making a blessing for positive mitzvot from which they are exempt, inasmuch as the standard text of most blessings includes the phrase, "Who has commanded us in His mitzvot..." and women are not commanded in this kind of mitzvah. That is why Rambam rules¹⁹ that, while a woman may sit in the sukkah, she should not recite the blessing "who has commanded us to dwell in the sukkah" – the biblical mitzvah applies only to men. However, Ra'avad dissents, for his position is that even if not commanded, women do get a

18. In *Tekufat Hachamma Uvirchoteha*, p. 73, the suggestion is made that *birkat hachamma* should not be considered an occasion of joy but rather a time to acknowledge that the Almighty totally runs the world. Thus, the *Shehecheyanu* is not appropriate. *Petach D'vir* also sees the phenomenon as part of the regular cycle of events in the world, not warranting the *Shehecheyanu*. That is not the view of *Panim Me'erot* 2:38.

19. *Hilchot Sukkah* 6:13.

reward for performing the act and therefore may recite the blessing. Nevertheless, Rambam's position is the one codified by the *Shulchan Aruch*: "although women are exempt from [the mitzvah of shofar], they are permitted to blow...but do not make a blessing."²⁰

However, Ramo appends this comment to the *Shulchan Aruch*: "But the [Ashkenazi] custom is that women do make blessings on positive commandments which are time-occasioned."²¹ The *Magen Avraham*²² suggests that perhaps the Ramo only meant to indicate that this is true of a mitzvah which entails some activity, then they can make a *beracha*, but that might not be the rule in a case where the blessing is the mitzvah (such as *birkat hachamma*). However, ultimately he rejects this conjecture and accepts Ramo's position without reservation.

Should we assume that the controversy regarding women not performing time-occasioned mitzvot applies also in the present case, when making a blessing on the sun's return to its original place? It would certainly appear to be a mitzvah occurring only at a certain time!

Although in fact there are eminent *poskim* who rule in the negative, for the reasons explained above, nevertheless, a number of outstanding rabbinic figures, including the Chazon Ish²³ and the author of *Magen Avraham*,²⁴ consider that women should recite the blessing. They offer some interesting rationales:

They maintain that the obligation of *birkat hachamma*

20. 589:6.

21. There is a similar disagreement between Rashi and Tosafot, *Rosh Hashanah* 33a. In terms of normative practice, Ashkenazi women do answer Amen to the blessing on hearing the shofar.

22. *Orach Chaim* 296:8, s.v. "Io yavdilu le'atzman".

23. Cited in *Petach Devir* IV:229. pp. 316-325.

24. *Orach Chaim*, at the end of 296.

includes women because in their view it is not a time-occasioned mitzvah at all, albeit it occurs only every 28 years. Just as one cannot recite the special blessings over thunder and lightning unless or until they are manifest, so too, one cannot recite the blessing on the sun until it returns to its original place. It is not the time which brings the mitzvah, but rather the location of the sun in its place which prompts our recitation, as the Chatam Sofer explains.²⁵ He characterizes it as a “general blessing”, of the type which is always required when one witnesses any uncommon phenomenon, such as lightning and thunder, or sees the ocean after a long hiatus. In his view, it would be comparable to the mitzvah of *bikkurim* (bringing the first fruits to the Temple), the time for whose performance started with Chanukah. It is not that the date of Chanukah generated the mitzvah of bringing the new fruit—rather, the produce did not reach its ripening time until then, and therefore the physical reality was that the blessing could not be said before Chanukah. Whenever the fruit became ripe, that is when there was a mitzvah to offer it in the Temple – and that maturation process occurred around Chanukah time.²⁶

Those who want to exclude women from the mitzvah of *birkat hachamma* additionally contend that it is similar to the blessing over the new moon (*kiddush levana*), which women do not recite, inasmuch as it is a mitzvah governed by time. Furthermore, as with the blessing over the new moon, the mitzvah is supposed to be done outside with a large group, and women, whose hallmark is modesty, should not be included in such a gathering (*kol kevuda bat melech penima*).²⁷

Those who do want to include women in the mitzvah,

25. *Chatam Sofer Orach Chaim* 56; others who concur are cited by *Piskei Teshuvot Orach Chaim* 229, footnotes 24-27; see also *Yechave Da'at* IV:18, n. 8.

26. *Turei Even*, *Megillah* 20b; *Petach Devir* 229:4, and note 10; *Chazon Ovadia*, *Birkat Ilanot*.

27. *Tehillim* 45:14.

however, contend that *birkat hachamma* should not be compared to the blessing over the new moon: women do not recite the new moon service because, according to midrashic tradition, the woman was complicit in the diminution of the moon, and that is why they do not participate in the ceremony.²⁸ As for the concern that it is not proper for a woman to be outside with a large crowd of people performing the mitzvah, they maintain that this is hardly a plausible argument in this day and age, where women go everywhere and do everything, and there is no opprobrium attached thereto.²⁹ Besides, *birkat hachamma* does not require a minyan; it can be recited by an individual at home.³⁰

Even according to those who consider *birkat hachamma* to be a time-occasioned mitzvah, a woman may opt to recite the blessing if she chooses to do so, even if not obligated. Actually, this permit would apply only to Ashkenazi women; according to Sephardic authorities (who follow the Rambam on this issue [*Hilchot Tzitzit* 3:9] as we have indicated), women should not recite the *birkat hachamma*.³¹

Time

We have cited the talmudic text which states that “one who sees the sun” at this time makes a blessing. Should that statement be taken literally—that only for that brief moment in time when the sun is in the requisite spot in the heavens, the blessing may be recited? Or is it possible that during the entire day when that event takes place, one may recite the blessing?

28. *Magen Avraham*, *Orach Chaim* 426, cited by Rav Ovadia Yosef *Yechave Da'at* *Orach Chaim* IV, p. 96.

29. This view is cited in *Yechave Da'at*, *ibid*, note 8, in the name of *Responsa Or Pnei Moshe*.

30. *Machazik Beracha* 229.

31. See *Yabiah Omer* I:39-42. The *Ben Ish Chai*, *Ekev*, no. 9, offers an alternate solution: the woman can listen to a man recite the blessing and answer Amen; see also *Shu"t Har Tzvi* *Orach Chaim* 119.

The Gemara simply indicates that one should do it in the morning of the appointed day, following the general principle in all mitzvot that “*zerizim makdimin lemitzvot*”, a mitzvah should be performed as early as possible, because “those who are zealous [in the service of G-d], perform mitzvot early.” Rav Ovadia Yosef writes³² that after kaddish of the morning prayer service, one should go outside and recite it.³³ Since the mitzvah is to make the blessing early in the morning, it is a good idea to pray at the very earliest minyan available.

However, the accepted practice is not to recite *birkat hachamma* before sunrise and optimally to wait until the entire orb of the sun is visible above the horizon.³⁴ Albeit there are those who recommend saying the morning prayers as early as possible (*vattikin*), one may recite the blessing any time within the first three hours of the day.³⁵ The limitation is due to the fact that the sun moves so swiftly that after three hours have passed, it is no longer in the original position of Creation. Others, however, permit recitation of the blessing until midday.³⁶

It has become the custom to pray the morning service at sunrise³⁷ and afterwards recite the *birkat hachamma* with a large

32. *Yechave Da'at* p. 90; *Chatam Sofer* 56.

33. *Davening* comes first, since we follow the principle—*tadir veshe'eino tadir, tadir kodeim*—when two mitzvot present themselves, one that we always perform, and the other only occasionally, the one that is done all the time takes precedence.

34. That would be about 2 ½ minutes after *netz*. See *Tekufat Hachamma*, p. 43.

35. *Magen Avraham* 229:5.

36. *Mor U'ketziyah* 22p; *Noda Biyehudah Dagul Mirevava* 229. Rav Ovadia Yosef presents a list of prominent rabbinic authorities who recited the *birkat hachamma* up until midday—and also a list of those who would not allow such a late recitation; see *Yechave Da'at* IV:18, n.3 on p. 90. The principle “*safek beracha lehakel*” surely applies here.

37. *Binyan Shlomo* II:14.

crowd of people.³⁸ Rav Ovadia Yosef is of the opinion that if the day is overcast and one cannot see the sun, but there is a momentary break in the clouds, one should recite the blessing, even interrupting recitation of *Keriat Shema* (between paragraphs)³⁹ if he thinks he may not have another opportunity later.⁴⁰

He considers it analogous to the case of a person who hears thunder in the middle of reciting *keriat shema*—the *Magen Avraham* rules that he should interrupt his prayer in order to recite the blessing.⁴¹

Manner of Recitation

It is preferable for a person to stand outside in the sunlight while reciting *birkat hachamma*. However, if one is ill and cannot go outside, he may observe the sun from a window (open if possible)⁴² and make the blessing.

Should one stand or sit while reciting *birkat hachamma*? Mitzvot do not necessarily require one to stand, although at times it is the appropriate posture. In general, blessings of appreciation for G-d's bounty (*birchot hanehenin*) may be said while sitting. For example, it is permissible to sit when making the blessing prior to eating food. *Birchot hamitzvot*, on the other hand, blessings over a mitzvah, should be said while standing. Thus, it is proper for a person to stand while listening to the blowing of the shofar on Rosh Hashanah.⁴³ This generalization

38. *Shu"t Betzel Hachochma* V:25, in the name of the Chazon Ish.

39. See *Berachot* 13 for definition of “between paragraphs”.

40. *Yechave Da'at* V:18.

41. 66:5. The same rationale is also found in *Shulchan Aruch Harav*, *Rabbi Akiva Eiger Berachot* II:n.15, *Noda Biyehudah Orach Chaim* 141:41 (who even includes a person listening to the Megillah being read).

42. *Mishnah Berurah Sha'ar Hatziyun* 426 n. 25.

43. See *Yechave Da'at* IV:18, note 16, who points out that whenever the Torah employs the word *lachem* (for you) in teaching a mitzvah, it is an indication that one should stand for that mitzvah. The Torah writes, “A day

is not accepted by the *Aruch Hashulchan*.⁴⁴

A person should stand when making the blessing “*hagomel*”,⁴⁵ thanking G-d for surviving a dangerous situation, but the *Aruch Hashulchan* maintains that the reason for that is because that blessing must be said in the presence of a minyan, and whenever there is a minyan, the Divine Presence is also there. We stand out of reverence for the presence of G-d, not because of the requirement to make a blessing.⁴⁶

This reasoning appears to be based on the Gemara,⁴⁷ where Abaye expresses the opinion that when people assemble to make the blessing for the new moon, it is as if they are welcoming the Divine Presence, and therefore all participants should be standing.

There appear to be two factors which make standing appropriate for recitation of a blessing: “Welcoming the Divine Presence (*shechina*)” and the presence of a minyan. Neither of these apply to *birkat hachamma*, and therefore “blessing the sun” may not be analogous to the ceremony of “blessing the moon.” Consequently, it is acceptable to sit if there is a pressing need. However, this proviso applies only if one is making the blessing individually; if a minyan assembles to perform this mitzvah then, as we have indicated, they should all stand.

A variety of customs have arisen in connection with making this momentous blessing and, in the words of Rav Ovadia Yosef, “each custom has what to rely on.”⁴⁸ The options are

of [blowing] *teruah* it shall be for you.” The *Torah Temimah* to *Devarim* 17:9, note 42, brings the opinion of the Rosh that when one counts the Omer, it is proper to be standing.

44. *Orach Chaim* 219:6,

45. *Rambam, Hilchot Berachot* 10:8, “she’omaid umevarech *hagomel...*”

46. 219:6.

47. *Sanhedrin* 42a.

48. *Yechave Da’at* IV:18, note 5. *Tekufat Hachamma Uvirchatah*, p. 88; *Moed*

that each person can recite individually or that a *chazzan* be appointed to recite it aloud, and all would answer Amen. There is even the custom to have one person recite *birkat hachamma* out loud, and then each person repeat it quietly, which is similar to *sefirat ha'omer* and the public recitation of *Hallel*.

Let us understand the rationale for each method: In Jewish thought, “with a large group, there is greater glory for the King” (*berov am hadrat melech*),⁴⁹ meaning that it is preferable for a large group to perform a mitzvah together, such as prayer, rather than for the same number of individuals to pray separately.⁵⁰ This “greater glory” is accomplished when one person recites out loud and all answer Amen, which has the effect of uniting them into one group.

However, others maintain that nowadays, it is better for each individual to make his/her own blessing in order to assure that the blessing is recited by each person with the proper intent.⁵¹ (The same reasoning underlies the common practice for each person to recite *birkat hamazon* (Grace after meals) quietly, even when there is one person reciting it aloud for the group.) The accepted Ashkenazi practice is that after the *chazzan* has recited it out loud, each individual repeats the *birkat hachamma* to himself, in the same manner that *Hallel* is recited in a group.

It is also customary to recite additional prayers on this

Lechol Chai 65:9.

49. *Mishlei* 14:28.

50. *Berachot* 53a; see *Yechave Da'at* IV:18, note 7, citing *Shu"t Rivam*, *chelek Yoreh Deah* 38.

51. *Shulchan Aruch Harav*, and Chida, *Birkei Yosef* 295:5. The fact that all the individuals are reciting their own blessing is not considered that they are making unnecessary blessings, since they specifically do not want to be exempted by means of the *chazzan*'s recitation. See also *Chazon Ovadia* II, p. 140.

occasion,⁵² after which one returns to the synagogue and completes the morning prayer service. Rav Yosef cautions that if one decides to say the *Aleinu* prayer while still outside, care must be taken not to face the sun when bowing for the phrase *va'anachnu kor'im...*". Although he does not explain his reasoning, evidently Rav Yosef does not want it to appear that we are bowing down to the sun.

Recitation of the prayer *Aleinu* is the subject of debate not only here. The Chida protests reciting *Aleinu* when performing the ceremony of blessing the new moon, and claims that it was introduced into this ceremony in error. In advocating removal of this prayer from the protocol, he admonishes people that, in general, one should not follow any custom unless he knows the root of the practice.⁵³

The *Mishnah Berurah*, on the other hand, definitely feels that *Aleinu* should be recited when blessing the new moon, citing good reasons for doing so.⁵⁴ He maintains that if *Aleinu* were omitted, it could lead to the mistaken impression that we are worshiping the moon. When we conclude with the *Aleinu*, it is clear that we worship only Hashem, from our words "because He is the only G-d." In accordance with the rationale of the *Mishnah Berurah*, it is customary to say the prayer *Aleinu* after making *birkat hachamma*, being careful to turn to the side away from the sun.

Mishnah Berurah also suggests certain psalms and prayers which are to be added before and after making *birkat hachamma*.⁵⁵

52. *Hashamayim kisi* until *chok natan velo ya'avot*. Some of these prayers are recited before *birkat hachamma* while others follow it. *Yechave Da'at* IV:18, p. 106. *Petach D'vir* IV writes that one should recite the verses in the Torah about the creation of the sun and moon; he outlines much of the procedure for the ceremony of *birkat hachamma* starting on p. 313 of part IV.

53. *Sefer Moreh Be'etzba*, cited in *Petach D'vir* 316.

54. 426:2; *Biur Halacha*, s.v. "umevarech".

55. See *Mishnah Berurah* 229, note 8.

Conclusion

Our world today is in crisis. Even hedonistic modern society is becoming increasingly concerned that our wastrel tendencies have led to global warming, toxic waste, pollution of the air and water. Belatedly, "greening" is becoming popular.

Our Torah has always taught us these basic lessons. Before Noach could save himself in his ark, he was commanded to gather living creatures of all species to take with him. Mankind has always been mandated by the Torah to preserve and protect the precious environment created by Hashem. Even in wartime, we must not devastate the countryside or cut down fruit trees.⁵⁶

When we recite a blessing upon seeing trees blossom in the spring, or upon viewing one of the majesties of creation, or to sanctify the New Moon, we declare our appreciation to the Almighty for the gorgeous world He created for our enjoyment and benefit. As we recite the *birkat hachamma*, rejoicing in the perfection of His creation and in awe at the perfection of the universe, we should fortify our determination to respect and safeguard this beautiful legacy for future generations.*

56. *Devarim* 20:19-20.

* On a personal note, we mention that this Journal is also marking its own milestone – completion of 28 years of publication. We give thanks to the Almighty for blessing this endeavor with success and affording us the opportunity to disseminate His Torah and teachings. Special thanks are tendered to Dr. Marvin Schick, President of the Rabbi Jacob Joseph School, for his courage, foresight, and fortitude in enabling this undertaking. May it be the will of the Almighty as we commence a new cycle, that we continue to grow, to learn, and to play a role in furthering love and understanding for Torah.

End of Life Therapies

David Shabtai

Despite the passing of four years since Terri Schaivo's death, the story preceding her death still brings vivid memories to the minds of many. The decisions and debates that led to the ultimate removal of her feeding tube and subsequent death were matters of discussion and debate at family dinner tables across the country. The importance of talking about these thorny and emotionally taxing issues of how far we may or must go in treating dying patients, both with family and *rabbanim*, before they should ever God-forbid become relevant, became very clear.

The purpose of this paper is to explore how the various *poskim* tackle treating terminally ill patients – their rationales, methods of dealing with the sources, and how these combine to form practical conclusions.

I. Background

The halachic and ethical difficulties surrounding these issues stem from the tensions between the mitzvah of saving life (as opposed to merely postponing death) and carefully avoiding the prohibition of murder, while simultaneously not violating the prohibition of standing idly by while a fellow Jew is in distress.

The prohibition of murder applies equally to all people, young and old, healthy and sick, conscious and comatose (Rambam, *Hilchot Rotzeach* 2:6-7). Furthermore, the Torah prohibits "standing idly by" (*lo ta'amod al dam re'echa*) while

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another person needs lifesaving measures that you are qualified to provide. A person needs to expend great effort for this mitzvah (*Sanhedrin* 73a). While it need [and should] not extend to risking one's own life, such effort certainly requires investing both time and money. The Torah further reinforces this idea by demanding life-saving in the positive sense as well. The Gemara describes the mitzvah of *ve-hashevota lo* ("and you shall return it to him," referring to found objects) expansively to include returning a person's health to himself (*lerabbot aveidat gufo*).

The *poskim* discuss whether the mandate of *pikuach nefesh* is applicable to all people or whether it is limited. Specifically, they question whether life-saving measures for a terminal, dying patient (*goses*)¹ override Shabbat restrictions. Is there a mitzvah / obligation to save the life of a *goses* on Shabbat?

This question was debated by the *Beit Ya'akov* (59) and the *Shevut Ya'akov* (OC 1:13) many years ago, with the former prohibiting and the latter permitting. The consensus of the *poskim* has been staunchly in support of the *Shevut Ya'akov*, that there is indeed a mitzvah of *hatzalah* to save the *goses*, even to extend his life for a short amount of time, and that this mitzvah overrides Shabbat restrictions.

II. Removing Impediments to the Soul's Departure

The halachic text with the clearest influence on all discussions of removing respirators and other therapies is Ramo's comments to *Yoreh Deah* 339. The *Shulchan Aruch* (YD 339:1) writes:

A *goses* is considered to be alive for all halachic purposes. It is forbidden to tie down his jaw ... or bathe him ... or remove a pillow from beneath him ... and it is forbidden

1. The definition of a *goses* will be analyzed below. It is used here to refer generally to an irreversibly terminal patient whose death is imminent.

to close his eyes until he has completely expired. And one who closes [a *goses*'s] eyes is considered to be a murderer.

Ramo adds several caveats:

It is forbidden to cause a person to die more quickly. For example, a person who is moribund for a lengthy period of time [*goses zeman aroch*] and [his soul] cannot leave [his body] – it is forbidden to remove the pillow or mattress from beneath him, as some people think that the feathers of certain birds cause [his soul to be unable to leave]; similarly, it is forbidden to move him from his place. It is also forbidden to place the keys to the synagogue by his head, so that [the soul] will separate [from the body]. However, if there is something that is causing a delay in the soul departing [*davar she-gorem ikuv yetziat ha-nefesh*], such as if in close proximity to the house there is someone chopping wood, or there is salt on the [dying person's] tongue, and these [the sound of the chopping or the salt] are preventing departure of the soul, it is permitted to remove them from there, as this is not considered to be an action [*de-ein ba-zeh ma'aseh kelal*] but is rather only [considered to be] removing an impediment [*she-meisir ha-mone'a*].²

On the one hand, Ramo's comments prohibit speeding or hurrying the death of a *goses*, but then permit removing an impediment to the soul's departure. What is the difference?

If we are commanded to violate Shabbat for the *pikuach nefesh* of a *goses*, doesn't that mean that there is a mitzvah to save his life (*hatzalah*)? Why is the mitzvah of *hatzalah*

2. There is some discrepancy as to the source for these halachot as quoted by the *Shiltei Gibborim* (*Mo'ed Kattan* 16b), specifically as regards removing a pillow from a *goses*'s head. It appears that the text of *Semachot* (3:1) that he used did not include this stipulation, while ours does. While historically intriguing, this textual variant is of little halachic consequence given that the accepted text of *Semachot* that we have today, and more importantly, the Ramo, both include this prohibition.

seemingly ignored? Moreover, why does removing an impediment to the soul's departure not violate the prohibition of *lo ta'amod*?

Lastly, it is vital to understand how these details are applicable to modern medicine: how does halacha view removing a respirator?

Many poskim note the apparent internal inconsistency in Ramo's ruling. They attempt to differentiate between speeding the onset of a *goses*'s death, which is forbidden, and removing an impediment to the departure of the *goses*'s soul, which is permitted.

Shiltei Gibborim (*Mo'ed Katan* 16b) first noted the apparent contradiction in the words of the *Sefer Chasidim* from which Ramo derived his ruling. He was the first to differentiate between causing (*gorem*) death and removing an impediment to the soul's departure (*hasarat ha-mone'a*). However, he merely describes such a difference, but does not fully define these two concepts, their interrelationships, and their limits.

Shiltei Gibborim makes oblique reference to a possibly-governing principle from *Semachot* (3:1): "One who closes the eyes of a dying [but still living] person is comparable to a murderer. To what is this similar? To a candle whose flame was [flickering and] about to go out – If a person came and placed his finger on the flame, it is immediately extinguished." He explains that when removing an impediment, such action does not extinguish the flame of life and therefore does not pose a problem.

The *Taz* (339:2) and *Shach* (339:7 and *Nekudat ha-Kesef* ad loc.) focus on the prohibition to move or even touch a *goses*; they view moving the *goses* as the prototypical prohibition. They distinguish between actions that involve bodily movement and those that are external to the patient's body. Any action that involves movement of the *goses*'s body is summarily prohibited; impediments to the soul's departure may only be removed if by doing so the *goses*'s body is left untouched.

The *Shach* and *Taz* disagree as to the technical “amount” of minimal movement that is prohibited – such as Ramo’s example of removing salt from a *goses*’s mouth that involves at least minimal movement. *Taz* disagrees with Ramo and prohibits removing the salt as it involves direct contact and movement of the *goses*. *Shach* supports Ramo’s decision, as he believes that the minimal movement required does not cross the threshold of prohibition. Both however support the general distinction between actions that involve moving the *goses* and those that do not.³

III. Violating Shabbat for *Pikuach Nefesh* of a *Goses* and Removing Impediments to the Soul’s Departure

How can we be commanded both to violate Shabbat to save the life of a *goses* and yet be permitted to “enable” his death by removing an impediment to his soul’s departure? In reconciling these two seemingly contradictory positions, the *poskim* either: (1) argue for the truth of the premise – these two themes are certainly at odds with each other – and offer a possible reconciliation between them, or (2) deny that a contradiction exists at all.

R. J. David Bleich answers this difficulty by agreeing with the premise; the two contradictory assertions cannot stand.⁴ R. Bleich argues that since the consensus of *poskim* is that *pikuach nefesh* of a *goses* certainly overrides potential Shabbat restrictions, actually doing so is mandatory; as such, whatever can be done, must be done to prolong life, even that of a *goses*.

3. A third, more creative, but less relied upon solution is offered by the *Levush* (339:1). He questions the prohibition of removing a pillow to distance the *goses* from feathers that are believed to be maintaining survival. Why is this not considered to be an example of removing an impediment to the soul’s departure? He explains that the belief in the power of the feathers was such that removing them would actively promote the speedy demise of the patient. Therefore, removing the pillow is forbidden as a form of murder.

4. *Bi-Netivot ha-Halachah* 3 (New York: Michael Scharf / Yeshiva University Press, 5761), 175-77.

R. Bleich therefore marginalizes the ruling of Ramo – the permission to remove an impediment to the soul's departure is an exception to the standard rule. For the large majority of patients, including most *gosesim*, all therapy **must** be continued and Shabbat **must** be violated if necessary to continue to administer these therapies. In some infrequent circumstances however, such as those delineated by Ramo, a limited number of therapies may be withdrawn.⁵

R. Shlomo Zalman Auerbach notes that “many people” are bothered by this seeming contradiction; he was not (*Shu”t Minchat Shlomo* 91:24:2). The fact that Shabbat restrictions are set aside to save the life of a *goses* does not necessarily mean that the *goses*’s life must be prolonged at all costs. Such a sentiment is similarly expressed by R. Yaakov Yisrael Kanievsky (the “Steipler”), who notes that while he had heard such arguments in his youth, he found no real basis to support such assertions (*Karyana de-Igartza*, no. 190).

R. Auerbach felt that ideally, a patient who is truly God-

5. R. Bleich further asserts that those therapies that Ramo permitted removing to allow the soul's departure are not bona fide medical remedies but are rather mere *segulot* – therapeutic attempts that do not conform to medical logic or experience. Refraining from employing actual medical remedies would violate *lo ta'amod*; refraining from using *segulot* entails no prohibition, and therefore Ramo permitted their removal in certain circumstances. Ramo’s examples of wood-chopping and salt on the tongue are not actual medical therapies and their usage is not mandated nor governed by normative halachic decisions.

Perhaps, however, Ramo’s omission of standard medicines from those therapies that one may remove is not as significant as R. Bleich suggests. Ramo listed those therapies that were administered in an effort to keep a patient alive – that upon removal, the patient would shortly die. There are clear parallels in modern medicine, such as respirators and intravenous bags; these therapies did not exist in the times of Ramo. The medications offered in his time were unable to keep patients alive minute to minute, but rather were attempts at alleviating pain or curing an underlying illness. It would stand to reason that modern continuously administered medications that maintain survival, such as vasopressors (blood pressure maintenance), would fall within the gamut of Ramo’s remarks.

fearing should want to be maintained alive as long as possible, despite potential suffering; this is the path of *tzadikim*. Such an attitude requires an intense feeling of closeness to Hashem and respect for the wonders of His world. However, R. Auerbach explains, since most people cannot attain such levels of *kedushah* (holiness), the halacha permits passively allowing a suffering *goses* to die. Nothing active, however, may ever be done to hasten the death of anybody, healthy or *goses*. With this in mind, R. Auerbach was clear that Ramo only permitted passive withholding of treatment; actively withdrawing any treatment is summarily forbidden.

In a similar vein, R. Shmuel ha-Levi Wosner (*Shu”t Shevet ha-Levi* 6:179) poses this apparent contradiction and analyzes whether the violation of Shabbat for a *goses* is obligatory or only permissible. He later concludes (*Ibid.* 8:86, 8:251:4, 8:287:3) that it is permissible to override Shabbat restrictions to save the life a *goses*, and despite not being obligatory, the permission to violate is itself sufficient to override the Shabbat restrictions.

By adopting this stance, these *poskim* effectively neutralize the question: It is permissible to violate Shabbat, but there is no obligation to do so. They argue that the question's assumption is simply incorrect – these two concepts are not interdependent. Since there is no definitive obligation to keep a *goses* alive, but only permission to do so, Ramo permits removing impediments to the soul's departure that would allow the patient to die.

IV. To Whom is Ramo Referring?

Many *poskim* view Ramo's halacha as very limited in scope. Given the all-encompassing prohibition of murder and its applicability to all people, as noted previously, these *poskim* focus on Ramo's specific formulation and reference to a *goses zeman aroch*.

Classic *Goses*

R. J. David Bleich argues that Ramo only distinguished between “an active and passive act” when it comes to a *goses*; by all other patients, no such distinctions may be drawn, and all actions, both active and passive, must be employed to promote the continued life and health of the patient.⁶

Ramo himself (*EH* 121:7, *CM* 211:2)⁷ defines a *goses* as one who is irreversibly and terminally ill so that he “brings up secretions in his throat on account of constriction of his chest.”⁸ R. Moshe Feinstein explains (*Shu”t Iggerot Moshe CM* 2 73:3, 75:5) that this description is not limited to any specific physiological abnormality and cannot be medically defined. Nonetheless, R. Feinstein asserts that the members of the *chevra kadisha* of years past were certainly able to identify such a condition in patients.

R. Bleich assumes that a defining property of *gesisah* is that most *gosesim* die within three days. This criterion is based on the halacha (*YD* 339:2) that if a person is informed that a relative of his was considered to be a *goses* up to three days ago,⁹ he must immediately begin observing mourning practices. However one wishes to define a *goses*, this property

6. R. Bleich, *ibid.*, 169-71; R. J. David Bleich, “Treatment of the Terminally Ill,” *Bioethical Dilemmas* (Hoboken, NJ: Ktav, 1998), 74-75.

7. The definition actually appears in parentheses in the middle of the text of the standard current printing of the *Shulchan Aruch*. However, in one of the earliest printings of the *Shulchan Aruch* with Ramo’s comments (Krakow, 1578), these parenthetical comments do not appear, arguing in favor of a later author, not Ramo himself.

8. Translation taken from Fred Rosner, et al, *Jewish Bioethics* (Hoboken, NJ: Ktav, 2000), 36.

9. R. Bleich explains that these definitions are not dependent upon medical ability. Rather, “a *goses* is one who cannot, under any circumstances, be maintained alive for a period of seventy-two hours ... If it is medically feasible to prolong life the patient is indeed not a *goses* and, therefore, in such instances there is a concomitant obligation to preserve the life of the patient as long as possible” (*Bioethical Dilemmas*, 78-79).

must stand firm. A *goses* is defined as a patient for whom doctors estimated that most (at least 51%) patients in a similar situation will die within three days. Once that determination has been made, even if the particular patient survives longer than 72 hours (meaning that he is from the minority of patients), his *goses* status is unchanged.¹⁰

On the other hand Dr. Abraham S. Abraham relates (*Nishmat Avraham* 2, 5767 ed., 450) that when he asked R. Shlomo Zalman Auerbach to define a *goses* for practical purposes, R. Auerbach responded, "You are the doctor." It would appear that it is the physician and not the halachist who is able to make this determination. Understanding that survival predictions in this area are rather murky, the determination is not temporally bound but rather dependent solely on expert opinion.

Non-Standard *Goses*

Many *poskim* do not identify the subject of Ramo's ruling directly, but it is clear from their analysis – whether or not they figure Ramo's distinction into the equation – how they regard the scope of this halacha. If we assume that removing an impediment to the soul's departure is predicated upon a lack of the mitzvah of *hatzalah* and concomitant lack of violation of *lo ta'amod*, then there seems to be no reason to limit Ramo's ruling to a *goses*. Indeed, many of these *poskim*'s explanations apply to all severely ill patients regardless of their predicted survival estimates. Applying this idea, *poskim* argue that Ramo used the term *goses* merely as an example of one for whom there is no mitzvah of *hatzalah* / violation of *lo ta'amod* when refraining from treating.

10. R. Bleich contends, based on a minority view, that this ruling is not limited to beginning mourning practices. He cites *Beit Shemuel EH* 17:18, 17:94 who permits a woman to marry a second husband on such testimony. This portion is not accepted by a majority of *poskim*. See *Dagul me-Revavah, ad loc.*, *Pitchei Teshuvah YD* 330:3, *EH* 17:13, *Gilyon Maharsha*, *YD* 339:2.

Perhaps this is why Ramo referred specifically to a *goses zeman aroch* – the term is both vague and seemingly unnecessary. There is no other mention of a condition of *goses zeman aroch* in halacha. Moreover, since this whole chapter of *Shulchan Aruch* is dedicated to the laws of a *goses*, why did Ramo indicate that his distinctions apply to a *goses zeman aroch*? Why include any modifier at all? Perhaps Ramo was indicating that this halacha should be applied based on its underlying logic – to whenever the mitzvah of *hatzalah* is suspended – thereby broadening the scope beyond the classic *goses*.

In the broadest view, R. Ovadiah Hedaya (*Shu"t Yaskil Avdi* 7:40) applies Ramo's ruling to a terminal patient for whom the doctors predict a short-term survival; the patient also happened to be a diabetic. R. Hedaya assumes that since this patient would certainly die within a short while and the doctors had already given up hope of curing his disease, he is certainly to be considered as included in Ramo's ruling. Rav Hedaya does not indicate that the patient was in great physical pain, nor does he mention any predicted survival period. The patient's terminal status was deemed sufficient to apply Ramo's halacha. This seems to be a novel interpretation and application of these rules.¹¹

R. Hershel Schachter offers a novel approach (*Be-Ikvei ha-Tzon*, no. 34). He argues that while a person does not have full ownership rights over his body, he does have a certain level of "ownership" as to what he considers to be *pikuach nefesh* – life-saving efforts – aimed at promoting his survival. R. Schachter finds support for this position in the ruling of R. Yaakov Emden (*Mor u-Ketzi'ah OC* 228:6) that we must force a patient

11. R. Nissan Telushkin ("Authority of a Person Over Himself" [Hebrew], *Ohr ha-Mizrach* 8:3 (Nissan 5721), 20-24), while disagreeing with R. Hedaya's halachic conclusion, seems to agree to the appropriateness of questioning this case in light of Ramo's ruling. R. Telushkin agrees to this premise but argues as to the specific technical aspects of the case.

to undergo therapy when the outcome is a certain cure. However, if a complete cure cannot be [close to] guaranteed and has possible negative side effects, it is up to the patient himself to determine whether or not we are doing him a favor by extending his life.

Noting R. Moshe Feinstein's position (*Shu"t Iggerot Moshe YD* 2:174:3) that it is forbidden to extend life at the expense of suffering, R. Schachter adds a caveat. Whenever it is clear that an overwhelming majority of people would prefer to undergo a given treatment, we ignore the patient's possible refusal.¹² The patient's opinion is mitigated by the overwhelming majority of people who disagree with him and therefore we may forcibly institute such therapy under the rubric of the mitzvah of *Ve-Nishmartem me'od le-nafshoteichem* ("Be exceedingly careful with your selves [bodies]," *Devarim* 4:15).¹³

In such an analysis, it is clear that when a patient chooses to forgo a certain therapy within his halachic ability to do so, there is certainly no obligation on a third party to insist on *hatzalah*.

R. Zalman Nechemiah Goldberg assumes that whenever death is preferable to life (*tov motto me-chayyav*), there is no longer a mitzvah of *hatzalah*.¹⁴ This determination is seemingly independent of predicted survival time with or without medical intervention. R. Goldberg believes that Ramo's halacha applies whenever death is preferable to life, and impediments to the soul's departure may be removed.¹⁵

12. R. Schachter does not statistically define what constitutes the "overwhelming majority of people" and does not feel it necessary to do so.

13. According to this view, if an overwhelming majority of all people would refuse such a treatment, preferring possible death to extremely painful side effects of therapy, a doctor may not cause such pain and agony to this patient, even at the patient's explicit request.

14. "On Saving Life and Choosing One Life Over Another" [Hebrew], *Moriah* 4-5:88-89 (Elul 5738) 48-56.

15. It is important to note that R. Goldberg no longer advises questioners

R. Goldberg effectively neutralizes the apparent contradiction by claiming that the two halachot refer to two different types of patients. He applies this rule to Shabbat violations – the halacha only requires [or possibly only permits] violating Shabbat for a patient for whom life is preferable to death. For any patient for whom death is preferable to life, Ramo would permit removing impediments to the soul's departure and violating Shabbat is indeed prohibited.^{16, 17}

R. Moshe Feinstein (*Shu"t Iggerot Moshe CM* 2:83-84) writes that it is clear that Ramo's halacha is not limited to the classic *goses*. He believes that the rationale for the permission to remove an impediment to the soul's departure is the tremendous suffering the patient experiences. The potential

to follow this approach. Rather, he directs them to follow the halacha as understood by R. Auerbach and R. Elyashiv.

16. A possible difficulty with this approach is that R. Goldberg must limit the case described in *Shulchan Aruch* (OC 329:2) to a patient who is not suffering and for whom life is preferable to death. This is a difficult claim as many *poskim* assume that the person described here is much closer to death, and most likely suffering more severely, than a standard *goses*. R. Goldberg would need to deal with the various questions raised by this parallel. He assumes that all the therapies mentioned by Ramo were indeed believed to be efficacious; a complete parallel exists with today's modern medical modalities such as intravenous medications and ventilators.

17. In a parallel, but distinct formulation, R. Moshe Hershler argues that a case where both patient and physicians have given up hope for a cure is parallel to giving up hope on finding a lost object ("The Obligation to Heal by Sick and Deathly Ill Patients" [Hebrew], *Halachah u-Refu'ah* 2 (Jerusalem: Machon Regensburg, 5741) 27-29). The very source for the *mitzvah hatzalah* is derived from the obligation to return lost property (*Sanhedrin* 73a). The Gemara derives that if there is a *mitzvah* to restore a lost object to its owner, how much greater must be the obligation to restore a person's health.

By taking this parallel to its logical conclusion, all details and exemptions that are present by the *mitzvah* of *hashavat aveidah* should be equally relevant to the *mitzvah hatzalah*. If the owner of a lost object has already given up hope of ever finding his lost object, the finder of that object need not return it to its rightful owner. Similarly, when a terminal patient (after consulting his physicians) gives up hope for returning to health, the *mitzvah hatzalah* ends.

prohibition is that of *lo ta'amod*, that R. Feinstein argues applies to that patient himself just as equally as it applies to bystanders. R. Feinstein believes that a person is not obligated to undergo tremendous suffering so as not to violate *lo ta'amod* and, therefore, can passively refuse treatment under such circumstances.

He explains that Ramo mentions a *goses* as an example of such a person who suffers terribly. R. Feinstein explains that the soul's leaving the body causes intractable pain and suffering and, as such, a *goses* need not endure such harsh conditions in attempting to fulfill the mitzvah of *hatzalah* to himself. So, too, any patient experiencing such pain need not undergo medical therapy and may refrain from medical intervention.

R. Eliezer Yehudah Waldenburg focuses on the different formulations by various *poskim* of the permission to remove an impediment to the soul's departure and the several contexts in which it is quoted. He believes that a unifying theory underscores these halachot.

R. Waldenburg differentiates between a *goses* who retains an intrinsic "life force" (*chiyyut atzmi*) and one who does not (*Shu"t Tzitz Eliezer* 13:89).¹⁸ Patients who no longer have any *chiyyut atzmi* can still be kept alive due to various external factors. It is specifically this type of patient, and this type of patient alone, to whom Ramo refers in *YD* 339. Ramo did not mean to make any other distinctions. For a patient being maintained solely by an external "life force," removal of therapy can be both active and can involve bodily movement. R. Waldenburg similarly does not differentiate between types of therapy; once a patient no longer has any *chiyyut atzmi*, food, oxygen, and antibiotics can be withheld (*ibid.* 14:80).

18. It is difficult to ascertain how to quantify or identify *chiyyut atzmi*, which appears to be a novel term, introduced and used only by R. Waldenburg. The Hebrew term will be used throughout this article for lack of adequate or appropriate English equivalent.

Moreover, R. Waldenburg believes that they must be withheld, in line with the view that prohibits extending the suffering of a *goses*.

In more clearly delineating the parameters of a patient who is maintained solely by an extrinsic "life force," R. Waldenburg explains that removing impediments to the soul's departure is permitted only when it can be clearly established that the patient has no intrinsic brain or cardiac "life force." A respirator may be removed from such a patient since it is not effectively prolonging life but merely "pumping air into the lungs and forcing them open like a balloon" (*ibid.*). R. Waldenburg explains that any permission given to removing an impediment to the soul's departure is predicated upon the assumption that the patient is already considered to be dead; he may still seem as if he has some "life force" remaining due to the external factors inducing certain bodily movements, but "since without the respirator he is considered to be dead, it is permitted to remove the machine" (*ibid.* 14:81).

R. Waldenburg suggests that most *gosesim* do not fit these criteria, as the minimal "life force" that a *goses* still holds on to is considered to be intrinsic to the patient (*ibid.* 14:80). As he describes elsewhere (*ibid.* 13:89), any and all therapies and medications must be administered to prolong the life of such patients. Ramo's halacha only comes into play in the very rare instances of patients who no longer have any intrinsic "life force" left.¹⁹

19. While not addressing this issue directly (and in somewhat terse style), it would appear that R. Yitzchak Yosef (son of R. Ovadya Yosef) agrees with R. Waldenburg's analysis (*Yalkut Yosef, Hilchot Bikur Cholim ve-Aveilut*, 5764 ed., p. 69). He understands the Gemara's (*Shabbat* 151b) warning against even closing the eyes of a *goses* as a warning against taking any steps whatsoever that will allow for an early demise.

R. Yosef argues that even in the face of suffering, it is forbidden to remove or refrain from employing any therapy whatsoever. Whatever suffering a person experience in this world has certainly been ordained from Above for some purpose and we have no right to interfere with this Divine calculus.

V. Application: What May be Done?

The manner in which *poskim* address Ramo's distinctions between the permissibility of types of actions taken directly influences whether or not they permit refraining from administering medication. It is important to note that not all *poskim* address all of these questions directly; they often relate to only some of them. Thus, it is difficult to reconstruct how each of these *poskim* would deal with the other issues at hand.

All treatments may be withdrawn

R. Hayyim David ha-Levi argues that removing a respirator entirely parallels Ramo's example of a grain of salt and therefore it may be removed.²⁰ Just as it is forbidden to extend the life of a *goses* by placing a grain of salt on his tongue, so too, it should be forbidden to artificially extend a *goses*'s life with artificial ventilation.

R. he-Levi's main reason is that the patient's "time has come" and he will die imminently; the only thing preventing the patient from already being dead is the impediment that you wish to remove. In such a case, it is certainly permitted to remove the impediment.

R. Hayyim David ha-Levi is one of the few *poskim* who does not distinguish between refraining from initiating a official respiration and removing one already in place. He permits actively removing a respirator from a patient once it has been determined that *gesisah* has ensued. Similarly, R. Ovadiah Hedaya argues for refraining from administering regular insulin injections for a diabetic patient diagnosed with a different terminal illness (that he does not specify) that will cause his death in the near future (*Shu"t Yaskil Avdi* 7:35). He

Like R. Waldenburg, R. Yosef requires that life be maintained and extended as long as possible, despite patient suffering.

20. "Removing a terminal patient from an artificial respirator" [Hebrew], *Tehumin* 2 (5741): 297; *Shu"t Aseh Lecha Rav* 5:30.

also does not distinguish between types of therapies. Once he determines that Ramo's comments apply to the patient at hand, he assumes that all medications may be withdrawn, including insulin.

Advocating a similar logic, R. Shlomo Goren explains that the prohibition of *lo ta'amod* is inapplicable in such instances. Any actions taken for the benefit of another person cannot stand in violation of the *lo ta'amod* prohibition; only that which would cause harm to another person presents a violation.^{21, 22}

R. Zalman Nechemiah Goldberg argues that withholding treatment does not even qualify as indirectly causing death.²³ Rather, when the doctor removes a specific therapy, the patient dies of his primary illness, being unable to administer the therapy to himself. Given his previously cited criteria of permitting such activity for any patient for whom "death is

21. R. Goren himself permitted removing anything that is only indirectly involved with the patient's death (*be-tzurah bilti yeshirah*) (*Me'orot* 2 (5740): 28). He specifically mentions the removal of a respirator and does not seem to place limitations on the type of therapy to be removed. He would seemingly permit removing food, oxygen, and medication of any type, so long as the removal itself does not directly cause the patient's immediate death.

22. R. Moshe Dov Welner adopts a similar approach by focusing on the analogy of the flickering flame cited earlier ("Rights and Obligations of Physicians" [Hebrew], *Ha-Torah ve-ha-Medinah* 7-8 (5715-17): 317-19). He argues that only "placing one's finger on the flame" is prohibited, by actively weakening a person's natural vitality. Removing an unnatural support is permitted though, even if by doing so the person will die sooner, since removing such artificial means of extending life is parallel to placing one's finger on the artificial device and not upon the "candle" itself.

Therefore, R. Welner concludes that whenever physicians have given up all hope of curing a given patient, the patient may refrain from all future therapy and remove any artificial means of life support or other treatment. This ruling applies to all patients, not only *gosesim*, and is independent of whether or not the patient is suffering. So long as there is no active extinguishing of the patient's life – removing and refraining from therapy is permitted.

23. *Moriah* 4-5:88-89 (Elul 5738) 48-56.

preferable to life," this ruling effectively permits refraining from initiating, and more importantly, actively removing any and all modes of therapy (including feeding tubes and respirators).

R. Goldberg applies a caveat to his ruling. Removing an impediment to the soul's departure is only permitted when such an action does not directly cause the immediate death of the patient. A ventilator may only be removed if, upon removal, the patient will not die immediately; he must be able to survive for a short period. R. Goldberg does not mention how to measure this interval, but it seems that several minutes should be sufficient to dissociate the action of removal from the ultimate death.^{24 25}

24. See however, R. Goldberg's response to R. Levi Yitzchak Halperin's comments to his original *Moriah* article, "Causing Death and Choosing one Life Over Another" [Hebrew], *Halacha u-Refu'ah* 2, 174, where R. Goldberg tries to define this criterion more specifically.

25. R. Levi Yitzchak Halperin challenged R. Goldberg's assertion and argued that removing a feeding tube or otherwise hindering a person's ability to eat is tantamount to murder ("Saving Life and Choosing One Life Over Another" [Hebrew], *Halacha u-Refu'ah* 2, 146-68, 181-84; *Shu't Ma'aseh Choshev* 3:4-5). Basing himself on the Rambam (*Hilchot Rotzeach* 3:10) he argues that passively preventing a person from eating is considered to be the same as starvation.

R. Goldberg takes his application a step further. He was asked about the possibility of removing a ventilator from a terminal patient to be used on a second patient who had a better chance of survival. He argued that if the first patient would be defined as a *tereifah* – a patient whose illness will certainly prevent a 12-month survival – the ventilator can be removed immediately, even if doing so would cause an immediate demise. R. Goldberg argues that since even directly killing a person determined to be a *treifah* is not considered murder, the only precept promoting maintaining the patient on the ventilator is the *mitzvat hatzalah*. R. Goldberg is also of the opinion that it is permissible, and perhaps even obligatory, to sacrifice the 'ephemeral life' (*chayyei sha'ah*) of the *tereifah* to save the potential 'full life' (*chayyei olam*) of the second patient. (See Meiri, *Beit ha-Bechirah*, *Sanhedrin* 72b; *Minchat Chinuch* 296; *Tiferet Yisrael*, *Bo'az*, *Yoma*, end of ch. 8). The consensus of most poskim is counter to this assertion. (See *Shu't Noda bi-Yehudah*, CM 2:59; *Shu't Iggerot Moshe*, CM 2:69:4; *Shu't Tzitz Eli'ezer* 10:25:5; R. Shlomo Zalman Auerbach quoted in *Nishmat Avraham* 2, 5753 ed., 157-58.)

It appears, however, that R. Zalman Nechemiah Goldberg has moderated his position somewhat in recent years. In a series of short guidelines regarding terminal patients, he permits removal of treatment, including ventilation, only when several criteria have been met.²⁶ He now requires that death be preferable to life, that the therapy to be stopped not fulfill a natural need of the patient, and that it not be of a routine nature. Only when all three of these criteria are fulfilled (or in certain circumstances, when the third criteria alone is applicable) may treatment be stopped.

Passive vs. active removal of therapies

R. Hershel Schachter (*Be-Ikvei ha-Tzon*, no. 34) applies a different standard of differentiating between therapies, as noted earlier. He does not distinguish between different modalities of treatment or between the purposes of such treatment. Rather, he allows a patient to decide on his own whether or not to proceed with any treatment (including ventilation) provided that the patient's decision does not counter the opinion of the overwhelming majority of all people, as discussed above.

R. Schachter argues that his principle is relevant only regarding initiating therapy; the patient's personal preference is vital and decisive before beginning any course of treatment. However, once treatment has begun, a separate system of regulations takes precedence. A doctor is forbidden from changing the patient's status quo to hasten his demise; he may only take positive actions to maintain the current situation. Accordingly, this means that a doctor may not remove a respirator for fear that doing so might kill the patient; however, if the respirator were to be removed, the physician is not obligated to return it to working order, as per R. Moshe

26. "Dying Patients – Short Responses" [Hebrew], *Assia* 16:3-5 [63-64] (5759): 6-8.

Feinstein's ruling. Similarly, a physician may not actively stop a feeding tube from administering nutrition; nonetheless, the physician is not obligated to refill the feeding tube once it has emptied.

This is effectively a consistent application of R. Schachter's thesis: a physician may not change the status quo if the patient will suffer or die more quickly as a result. Therefore, when the patient is conscious, he may voluntarily elect to initiate therapies. Alternatively, he may choose to forgo any additional medical procedures and allow the status quo to proceed unhindered. The only problem arises when the status quo would be actively changed in such a way that the patient's demise is hastened.

R. Moshe Hershler distinguishes between two types of terminal patients.²⁷ The first is a *goses* (whom doctors have given up hope of curing) whose "life force stems from his natural vitality." Treating this patient supports his natural ability to live. Promoting or speeding the death of such a patient is tantamount to murder; any action that is forbidden when performed directly is similarly prohibited when done indirectly. Ramo referred to this type of patient when he ruled that "one may not remove the pillow from his head." The second patient is also a *goses*, but for him, any treatments can only "sustain him as is and prevent death"; this patient's life is being extended in an artificial manner. For this patient there is no longer any *mitzvat hatzalah* and, therefore, Ramo allows removing such impediments to death.

R. Hershler is clear that wherever there is any hope of the patient regaining consciousness, even if only temporarily and despite having no hope of an eventual cure – doctors must try their best to help the patient attain consciousness. The lack of ability to regain consciousness is certainly not the only

27. "The Obligation to Heal by Sick and Deathly Ill Patients" [Hebrew], *Halachah u-Refu'ah* 2, 30-49.

barometer of hope in this context, but certainly plays an important role.²⁸

R. Hershler does establish an important limitation in these matters, even as regards the second type of patient. He differentiates between the “normal needs of a person that enhances his strength” (*kol tzorchei ha-adam ha-regilim she-heim magbirim kocho*) and other forms of therapy. Food and oxygen actively promote normal health and therefore may not be removed. He concludes that removing a ventilator from any patient is certainly forbidden, but “we need not protest” if somebody were not to reconnect the hoses after replacing the oxygen tank.

While these limitations are found in many *poskim*, the basic assumptions may be challenged. R. Hershler assumes that which fulfills the needs of “normal” people will certainly promote health, even of a *goses*. If this were a medical criterion, this decision would need to rest with the physician and be determined on a case-by-case basis. It does not seem that R. Hershler is making the claim that halacha determines this criterion; therefore, the decision as to what treatments actually promote health should be determined by each patient’s individual physician.

Basic needs vs. additional physiological support

28. R. Yehudah Zerachyah Segel similarly focuses on these crucial moments (“Rules Concerning a Critical Patient and a *Goses*” [Hebrew], *Be-Netivei Chesed ve-Emet* (5747): 28-42). In a discussion of administering powerful pain controlling medications, he comments on the importance of consciousness during these last hours and moments. The Halacha (SA YD 338) places great emphasis on reciting confession (*viduy*) before one’s death as an important avenue towards repentance. Moreover, *Meiri* (*Yoma* 85a) writes that Shabbat may be violated to save the life of a patient who will only live for a short time thereafter, since during that extended period a person can engage in *teshuvah*. He therefore argues that there must be some balance between controlling pain and retaining consciousness to allow a patient to take advantage of and utilize these crucial and powerful moments.

R. Shlomo Zalman Auerbach argues that the Ramo's permission to passively withhold treatment from a *goses* was specifically limited to medicinal therapies. However, since food and oxygen are considered to be the basic needs of human beings, they may never be removed (*Shu"t Minchat Shelomo* 1:91:24:2). R. Auerbach differentiates between interventions that "fulfill the patient's natural needs or are accepted as routine and those that are exceptional" and are not intended to replace the patient's basic, natural requirements (*Nishmat Avraham* 2, 5753 ed., 245-46). Therefore, life-maintaining therapies that are required to maintain the natural needs of healthy living, even when administered artificially, must be administered and may not be removed. Examples of such therapies include insulin injections for diabetes, antibiotics for bacterial infections, and hemodialysis for kidney failure.

The last example, hemodialysis, is very instructive. Hemodialysis is a procedure that mechanically "filters" the blood of a patient whose kidneys no longer fulfill that function. While the regimen varies by patient, patients are generally connected to dialysis machines for several sessions of several hours each per week. R. Auerbach feels that since the dialysis machine substitutes for the patient's natural functions, for a patient who has received dialysis therapy for some time, the machine effectively "becomes" the patient's kidneys. Therefore, even though administered intermittently, dialysis has the same status of a continuous therapy that maintains the natural needs of the body – neither may be stopped or removed. However, consistent with his general approach, R. Auerbach would not require initiating dialysis for a patient who has never previously received such treatment. Dialysis does not qualify as a natural need and, therefore, need only be continued when it has been used for some time and can be described as having replaced the patient's kidneys.

He applies a similar logic to respirators. If a patient is

successfully weaned off a respirator, but within 48 hours requires reintubation – R. Auerbach required that the respirator be reattached. The respirator effectively functioned as the patient's lungs and therefore, R. Auerbach did not consider the reintubation to be a "new" active therapy, but rather a continuation of maintaining the patient's basic needs that must be fulfilled and may not be removed.

Consistent with his approach, he did not require actively (*be-kum ve-aseh*) administering (non-routine, non-fulfilling basic natural needs) therapy when there was no hope of a cure. Therefore, he permitted not resuscitating such patients when they were suffering greatly. Only at the point where the therapy qualified as "cosmetic," did R. Auerbach permit withholding continuous, natural needs-fulfilling therapies. "Cosmetic" therapy refers to "treating the chart," meaning that the therapy is really not benefiting or maintaining the patient in any way.²⁹

Dr. Abraham relates a discussion he had with R. Auerbach regarding a patient suffering from ALS (amyotrophic lateral sclerosis, also known as Lou Gehrig's disease).³⁰ ALS causes gradual muscular paralysis starting at the periphery and progressing more centrally until the patient cannot move at

29. Dr. Avraham Steinberg relates that during his father's last hours, his father's blood pressure was dropping wildly each time the IV bag with the vasopressor medication ran out (*Entzyklopädie Hilchudit Refu'it* 4, s.v. *noteh lamut*, fn. 357). He relates that the nurses were rushing to change the bags as quickly as possible so as not to allow his blood pressure to drop; this medication was maintaining his life. R. Auerbach was consulted late that night and ruled that once the bag emptied there was no need to replace it. This ruling is consistent with the theory presented above. Stopping any medication is certainly out of the question; it is never permitted for fear of hastening death. While removing, or refraining from refilling continuous, natural needs-fulfilling medications is generally prohibited, Dr. Steinberg's father no longer had any *chiyyut atzmi*; this case was certainly one where the doctors were "treating the chart" and not the patient. Therefore, R. Auerbach ruled that the vasopressors need not be refilled.

30. *Nishmat Avraham* 4, 5753 ed., 153-56.

all; these patients usually remain fully conscious and aware of their condition and surroundings, but cannot respond [except through blinking]. Concomitant with the paralysis is an extreme muscular and joint-related hypersensitivity, evoking terrible pain to even minor tactile sensations. As the paralysis travels inward, the respiratory muscles are affected, leading to repeated bouts of pneumonia. Ultimately, breathing cannot continue naturally and the patient must be placed on a respirator. There is as yet no known cure or effective therapy for treating ALS.

R. Auerbach ruled that while the patient can still breathe independently, antibiotics must be administered to treat the repeated opportunistic pneumonias. However, this need not be at the expense of intense suffering. Therefore, R. Auerbach insisted only on oral antibiotics but felt that injections that evoked severe painful sensations due to the extreme hypersensitivity were not required. Consistent with his approach outlined above, R. Auerbach did not require implementing mechanical ventilation when the time came that an ALS patient could no longer breathe independently.

R. Yosef Shalom Elyashiv holds an approach somewhere between that of R. Waldenburg and R. Auerbach (*Nishmat Avraham* 4, 5753 ed., 153). Similar to R. Waldenburg, R. Elyashiv assumes that a doctor must do everything possible to extend life, so long as the patient has not yet become a *goses*. However, like R. Auerbach, he permits a patient who is suffering greatly to passively refuse additional therapy.

R. Elyashiv, however, adds an interesting caveat: this leniency applies only when we know, or can tell that the patient is suffering. Once a patient is no longer conscious, all therapy must be initiated, including resuscitation, since we cannot be certain that he is suffering. On this point, he parts ways with R. Auerbach: What is the status of a patient who initially was conscious and related that his suffering was of sufficient severity to permit refusal of treatment, and then became unconscious before treatment could be refused? R.

Auerbach assumes that he is now closer to death, and as such, his suffering certainly did not diminish. R. Elyashiv argues that, while logical, this approach does not account for the fact that once unconscious there is no way to know what the patient is experiencing; as such, all therapies must be continued and none can be stopped.³¹ Ironically, R. Elyashiv would argue that as a patient approaches death, more therapies must be initiated and fewer refused.³²

R. Moshe Feinstein adopted a similar approach, but in a more moderated sense.³³ R. Feinstein explains that the basis for Ramo's halacha is rooted in the suffering of the patient. R. Feinstein understands the qualification of giving up all of one's wealth (*kol mamono*) to prevent violation of a negative prohibition, to be just that, all of one's wealth, not an idiom expressing the obligation to do anything in one's power to prevent violation. There are things in this world that are "greater" or "worth more" than all of a person's monetary possessions; tremendous suffering is an example of such a concept. Therefore, if a person is suffering greatly and keeping him alive will cause such pain that others would be willing to give up all their monetary possessions [and then some] to avoid – there is no violation of *lo ta'amod* in standing idly by and not administering life-prolonging therapy. Therefore, he maintains that a patient who is suffering greatly need not be

31. *Nishmat Avraham* 4, 5753 ed., 153.

32. R. Yitzchak Zilberstein echoes his father-in-law's (R. Elyashiv) approach and compares it to R. Waldenburg's opinion ("Resuscitation of a Patient in a Vegetative State When His Wife Will Continue to Remain an *Agunah*" [Hebrew], *Bi-Shevilei ha-Refuah* 9 (5749): 80-81). R. Zilberstein rules that so long as a patient is able to breathe, even if assisted by artificial means, he is considered to be just as alive as any healthy person. Therefore, there is a clear obligation to administer any and all therapies attempting at curing or maintaining and extending the patient's life. He quotes R. Waldenburg as arguing, "so long as the patient is connected to life, in whatever capacity, he is considered to be alive for all purposes."

33. *Shu"t Iggerot Moshe* CM 2:72.

actively treated and may refuse continued therapy.³⁴

In a ruling similar to R. Auerbach and R. Elyashiv, R. Feinstein prohibits removing food and oxygen from any patient. He argues that suffering attributable to difficulty breathing is certainly greater than suffering experienced otherwise; R. Feinstein argues similarly regarding nutrition. A doctor must therefore administer oxygen and nutrition, as a method of alleviating pain. Although R. Feinstein only mentions food and oxygen, this logic would seem to apply to all routine medical interventions, such as insulin and antibiotics – precisely paralleling this element in R. Auerbach's opinion.

Following this logic, R. Feinstein requires treating all secondary illnesses, even when the primary illness is hopelessly terminal (such as a cancer patient suffering from a bacterial infection). Since people would want to rid themselves of this illness and the therapy for doing so does not induce pain (even to a terminal patient), the patient is obligated to be treated in this fashion.

It is important to reiterate that R. Feinstein understands Ramo's halacha to be dependent on the patient's suffering. This is a severe practical limitation, as modern medicine has made great strides in controlling pain. Suffering, however, is not necessarily limited to physical pain but can also include intense, perpetual nausea and mental anguish; current medical practice is only slowly learning how to control and alleviate these other forms of pain.³⁵

34. R. Feinstein believes that the source for this approach can be found in the Gemara's narrative of Rebbi's handmaiden (*Shu"t Iggerot Moshe YD* 3:132). While he admits that prayer is not necessarily similar to medical therapy – the underlying focus of the story is that a person need not do everything in his power to continue living a life of extreme suffering. R. Feinstein, however, prohibited actively removing a respirator as doing so may in fact bring about the speedy demise of the patient.

35. R. Waldenburg notes (*Shu"t Tzitz Eliezer* 13:89) that all suffering must be alleviated; halacha does not distinguish between physical pain and

If a patient's suffering can be pharmaceutically controlled, R. Feinstein would seemingly only permit removing impediments to the soul's departure when the patient becomes a *goses*. R. Feinstein explained that *gesisah* is terribly painful for the soul (even if medically we cannot chart such pain in a scientific manner) and, therefore, there is no obligation to prolong the life of a *goses*. The *goses* in this context then, is merely an example of one whose pain exceeds that which it is mandated to forfeit (*kol mamono*) to prevent violating *lo ta'amod*. One would be similarly permitted to remove an impediment to the soul's departure from any person who was experiencing such pain.

In defining a *goses*, however, R. Feinstein requires that a physician make the determination that at least 51% of patients in similar situations would not live for more than 72 hours. As noted, doctors are hesitant to make this determination. Therefore, practical implementation of R. Feinstein's theory is not always feasible. He would permit removing a respirator only in the rare circumstance that a physician will make such a determination or when the patient is suffering intractably, whether physically or otherwise, when medical therapy is to no avail in controlling his suffering.

Limited permission to withdraw or withhold therapy

R. Eliezer Yehudah Waldenburg is unequivocal in his opinion that anything and everything must be done, medically and otherwise, to promote the continued survival of a *goses* (*Shu"t Tzitz Eliezer* 5 *Ramat Rachel* sec. 25, 29; 9:47; 18:62). Among the various proofs he cites for this position is the *Shulchan Aruch*'s (*OC* 329:4) position that if a person is found

psychological anguish. Whenever a patient is suffering, a Jewish doctor must try to alleviate the suffering, even knowing full well that such medications often carry serious, and possibly even fatal, side effects. Perhaps the most well known of such medications is morphine – it functions as a wonderful anesthetic, but also can depress respiratory function.

under a heap of rubble and is in terrible shape with hopes of living only for a short while [certainly not until next Shabbat] – Shabbat restrictions are nonetheless set aside and all efforts must be made in an attempt to maintain the victim alive for as long as possible.

R. Waldenburg explains that these few extra moments of potential life are certainly filled with great suffering, but nonetheless, the rescuers are commanded to do everything in their power to promote survival for as long as possible. He understands this obligation to override even protest from the victim himself requesting to be left to die. R. Waldenburg explains that human beings cannot understand the “value” or “worth” of even ephemeral moments of life and, therefore, the decision to promote survival must, by definition, be a halachic one, certainly not left to the emotional turmoil surrounding the moments before death.

Conclusion

The halachic world includes a wide range of opinions as to when therapy must be continued and when it may be stopped, and definitive rules are elusive. This article is meant only to serve as a springboard for discussion – to highlight the various important issues and to bring to light some of the major halachic opinions on these matters. It is intended to inform and relay the important issues at hand that can make a practical consultation with a *posek* more substantive. May all of these issues remain within the realm of the theoretical.

Praying with a Minyan on an Airplane

Rabbi Jason Weiner

Communal prayer is a great mitzvah and the hallmark of a religious Jew's daily life. However, a minyan on an airplane can be very disruptive. People are awakened to join the minyan, even though they may have struggled for hours to fall asleep on a long flight and may prefer to be left alone. Additionally, other passengers are often disturbed, food service is delayed by clogged aisles, passenger safety is compromised, and other passengers may not be able to access the restrooms.

A conscientious Jew is thus faced with a dilemma: to pray quietly in his seat, or to join a minyan which may cause these and other disruptions. Rav Shlomo Zalman Auerbach's students report that their Rebbe was "opposed to forming minyanim during a flight because it disturbs the other passengers."¹ Rav Shlomo Zalman's reasoning is not explained in detail, but we will humbly attempt to do so below.

Chazal praised and extolled the importance of praying with a minyan. For example, the Gemara states that despite the mitzvah of keeping a slave,² R. Eliezer once freed his slave in order to complete a minyan.³ Based on this incident, the *Shulchan Aruch Harav* writes, "Even though communal prayer

1. *Halichot Shlomo, Hilchot Tefillah*, p. 96 fn. 12.

2. *Vayikra* 25:46.

3. *Berachot* 47b.

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is of rabbinic origin, it is greater than a positive commandment of the Torah, for it publicly sanctifies *Hashem*.⁴ Furthermore, in a number of powerful rabbinic statements, we are taught that prayer is most acceptable to God if it is said with a minyan.⁵

However, despite the great lengths that *Chazal* go through to emphasize the value of prayer with a minyan, the *Shulchan Aruch* simply writes that one should “*yishtadel*”, make an effort, to pray with a minyan.⁶ Many have posited that the *Shulchan Aruch* uses such a nonobligatory term because the primary mitzvah is not prayer with a minyan but the endeavor to make our prayers more readily acceptable to *Hashem*.⁷ Since

4. *Shulchan Aruch HaRav, Orach Chaim* 90:17.

5. The *Midrash Rabba Devarim* 2:12 says that communal prayer is always answered, “*leolam aina chozeret reikam*”; *Sotah* 33a says that God listens to prayer of the public, and *Rashi* adds that God is never disgusted by communal prayer; *Yevamot* 49b claims that God is always found in communal prayer; *Berachot* 8a states that prayer with a minyan is “*ait ratzon* - a propitious time”; *Berachot* 6a says in the name of Rav Yochanan that God only hears prayers in the Synagogue, but *Tosafot* in *Avodah Zarah* 4b s.v. “*kivan d’ika*” quotes this *Gemara* as meaning that God only listens to communal prayer. The *Rif* quotes this *Gemara* and starts the quote referring to prayer in the Synagogue, but concludes it in reference to communal prayer. The *Rosh* and *Tur* also combine these two ideas and conclude that “One should only pray in a synagogue with a minyan, for Rav Yochanan said that a person’s prayer is only heard in a synagogue, which means with a minyan.” According to the *sefer Beit Haotzar* 1:27, communal prayer is heard even if one does not have *kavvana* (proper intent). According to the *Mabit*, *sefer Beit Elokim* 11, this is either because one has better *kavvana* with a minyan or since it is the proper way to pray.

6. *Shulchan Aruch Orach Chaim* 90:9.

7. *Piskei Teshuvot*, vol. 1, p. 690; *Yalkut Yosef*, vol.5, pp. 240-41, also comes to the conclusion that communal prayer is not a mitzvah in and of itself, but since communal prayer is more effective than individual prayer, it is best to pray with a minyan as an attempt to get our prayers answered. As proof for this contention, he cites the language of various *rishonim*. For example, when the *Rambam* records an obligation to pray with a minyan, he prefacing the statement by noting communal prayer is always heard, then continues, “therefore, one should pray with a minyan (*Rambam, Hilchot Tefillah* 8:1).” See also *Teshuvot V’hanhagot* 1:97. Rav Moshe Feinstein *Iggerot Moshe* OC

prayer with a minyan is not the essential mitzvah, but a means to an end, the *Shulchan Aruch* and other halachic authorities permit one to pray without a minyan when they are “*Anus*” (unable).⁸ Additionally, according the Gemara, Rav Nachman was not accustomed to attending synagogue to pray with the congregation because he “was unable to do so,” further emphasizing the possibility of praying alone.⁹ Rashi explains that he was very weak, and it was too troublesome for him to assemble a minyan in his home. Based on this, the Magen Avraham rules that one does not have to pray with a minyan if it is very challenging for them to do so or even if they are just weak,¹⁰ which makes it clear that despite the great importance of communal prayer, there are situations in which it would not be obligatory.

Poskim throughout the generations have also argued that in addition to physical difficulty and health concerns, one must forgo public prayer in order to fulfill a mitzvah, even if it is only a rabbinic obligation.¹¹ In addition to fulfilling a greater

2:27 & 3:7. and Dayan Yitzchak Yaakov Weiss have made similar points, though Reb Moshe does hold that when there is no reason to exempt one from communal prayer, there is an obligation (“*Chiyuv*”) to pray with a minyan despite the nonobligatory language used by the *Shulchan Aruch*. Dayan Weiss similarly writes that the *Shulchan Aruch*’s use of the term “*yishtadel*” is meant to express the fact that communal prayer is so important that even when one is legitimately exempt from communal prayer, he should still try his best to pray with a minyan if possible, *Minchat Yitzchak* 7:6.

8. *Shulchan Aruch* OC 90:9; In addition to a case of *Ones*, the *Mishnah Berurah* 89:20 states that in a *Shaat Hadechak* – time of duress – one would also not be obligated to pray with a minyan.

9. *Berachot* 7b. (Though this implies that one may pray alone under certain circumstances, it also makes clear that without compelling justification one must pray with a minyan if at all able to).

10. *Magen Avraham*, *Orach Chaim* 90:16. (Also quoted by *Shulchan Aruch HaRav* 90:10, *Mishnah Berurah* 90:29, and *Aruch Hashulchan* 90:13). This is a rather low threshold to permit one to pray without a minyan.

11. The *Mishnah Berurah* 90:53 writes that if one is going to do a *dvar mitzvah* he can miss *tefillah betzibbur*; *Sefer Ishei Yisrael* 12:2 also writes that

mitzvah, prominent *poskim* throughout the generations have ruled that if one would be forced to transgress even a rabbinic prohibition in order to attend minyan, he should avoid communal prayer.¹²

There are also a number of circumstances in which it would not be proper to pray with a minyan, as other values "trump" the value of public prayer, such as if one does not have *tefillin* with him and will not be able to get a pair until after the community has finished its prayers. In such a situation it is better to pray alone with *tefillin* than with the community without *tefillin*.¹³ A similar example is if the only minyan a

health needs, financial concerns, or fulfilling a mitzvah all override *tefillah betzibbur*; *Tefillah K'hilchata* 8:9 says that Rav Shlomo Zalman Auerbach told him that one may knowingly miss *tefillah betzibbur* to fulfill a mitzvah; in 8:27 he explains that this even applies to washing oneself before Shabbat if there is no other chance, and according to the *Be'er Halacha* 250 s.v. "yashkim baboker" this also applies to purchasing one's Shabbat needs if they will have no other chance to do so; *Aruch Hashulchan* 90:20 says that going to work to support one's family is considered a *dvar mitzvah* and can exempt one from *tefillah betzibbur*. According to *Ishei Yisrael* 12:30, one is even allowed to skip *tefillah betzibbur* in order to bring needy guests to his house. Indeed, Rav Shlomo Zalman Auerbach, quoted in *Halichot Shlomo* 5:8 (page 63 fn. 28), permits people to miss public prayer in order to perform mitzvot whose time will pass, such as blowing *shofar* or putting on *tefillin*. Quoting *Hatzava K'hilachta* 32 fn. 20, Rav Shlomo Zalman Auerbach also rules that if one has a choice to blow *shofar* for soldiers in the Israeli army or to use that time to pray with a minyan, he should blow *shofar*, even on the second day of Rosh Hashanah, when the obligation to hear *shofar* is only rabbinic (as explained in *Halichot Shlomo, Moadim*, p. 28 (11) fn.40) See also *Shevet Halevi* 6:36, that one may even go to a place for Shabbat that does not have a minyan in order to do outreach.

12. For example, the Maharil (*Minhagim, Eruvei Chatzerot* 7) ruled that one may make an *Eruv Techumin* on Shabbat only in order to attend a *dvar mitzvah*, such as a house of mourning or a wedding meal, but was in doubt if one would be able to pray with a minyan, because "To pray with a minyan is not such a mitzvah, for one can simply focus their prayers at home-*להתפלל בעשרה אינה כ"כ מצוה דיכוں תפלו בביתו*". This ruling is quoted by the Magen Avraham OC 415, *Petach Hadvir* 90:2 (9), *Shu"t Rabbi Akiva Eiger* 13. See *Chavot Yair* 112-15 for another example.

13. *Mishnah Berurah* 66:40.

person can find will be praying *mincha* after sunset, it is better to pray alone at the proper time rather than later with this minyan.¹⁴

In addition to the precedence given to fulfilling greater or more pressing mitzvot over public prayer, avoidance of negative consequences is also taken into consideration. For example, if one would have to walk home alone at night or in an unsafe place in order to pray with the community, he is not obligated to do so.¹⁵ Similarly, if a Torah scholar would cause a *chillul Hashem* – desecration of the divine name, by coming late to shul, he would be exempt.¹⁶

We thus see that prayer with a minyan has an unusual status in *Chazal* and halacha: It is very valuable and praiseworthy, yet it is not unconditionally obligatory. We have seen sources in *Chazal* and throughout the ages that offer different valid reasons to forgo prayer with a minyan.

We may now apply the halachic categories to the question of airplane prayer. If a minyan on an airplane is very disruptive and upsetting to the flight crew and one's fellow passengers, then there are both negative and positive values that override the need to pray with a minyan.¹⁷ On the positive side, we

14. *Mishnah Berurah* 233:14; see *Teshuvot V'hanhagot* 1:85 for further discussion of this issue.

15. *Mishnah Berurah* 90:51,52; *Kaf Hachaim* 90:57; *Shearim Metzuyanim B'hala'ah* 68:4; *Ishei Yisrael* 8:29, 12:16; See *Shevet Halevi* 8:19 that one who must pass through an Arab village to pray with a minyan is better off praying alone, as this could put his life in danger. According to *Orach Ne'eman* 90:54, this is all true even if one is not certain of the danger.

16. *Mishnah Berurah* 90:33. The *Shulchan Aruch* rules that even if one must pray alone, at least he should do so in a synagogue; this source indicates that despite the fact that it is better to pray alone in a synagogue than in one's home, if prayer in a synagogue could create a *chillul Hashem*, it would be better to pray alone.

17. Despite the fact that most *poskim* strongly encourage people to pray with a minyan whenever possible unless there is a very difficult case of *ones* or *shaat hadechak*, as mentioned above, we do indeed find instances when *poskim* allow people to pray alone in certain circumstances, as long as it is on

have seen that fulfilling a mitzvah often takes precedence over communal prayer; the mitzvah of *Ahavat Yisrael* (love your neighbor as yourself)¹⁸ and the value of *Kevod Habriyot* (human dignity) must certainly be counted among them.¹⁹ We also have a principle that “*Deracheha darchei noam* – the paths of Torah are pleasant.”²⁰ When religious Jews are well behaved and observe their religion with pleasantness, they show that the ways of Torah are pleasant, which is not true when they are rowdy and disturb others with their prayer.

On the negative side, we have seen that causing unnecessary

an irregular basis. For example, Rav Shternbuch (*Teshuvot V'hanhagot* 1:67) was asked if it is better to pray with a minyan that *davens* early in the morning, before sunrise, or pray alone at the proper time, to which he responded that as long as this is not done on a regular basis, a person can pray alone if there is no other choice, but if this were to be one's regular minyan, one should rather pray with the minyan than pray alone every day. Rav Shternbuch gave a similar answer regarding praying with a minyan that *davens mincha* after sunset (*Ibid.*, 1:85). This would be similar to a minyan on an airplane, even if one is normally careful to pray with a minyan, there is room to permit one to pray alone on this irregular occasion. Rav Shternbuch points out that when praying alone, one should be extra careful to have proper *kavvana*.

18. The *Sefer Hachinuch*, *Mitzvah* 243 writes that the purpose of “*Ahavat Yisrael*” is to bring about peace between people, and based on this mitzvah one may not cause any sort of harm or anguish to others.

19. We have a principle that *Kevod Habriyot* is so important that it overrides many mitzvot, and most rabbinic prohibitions (*Brachot* 19b, *Shabbat* 81b & 94b, *Menachot* 38a, *Eruvin* 41b). The vast majority of authorities give communal prayer the status of a rabbinic mitzvah. (See *Yalkut Yosef* vol.5 pp. 238-39 & 244, where he proves at length that the consensus opinion is that communal prayer is a rabbinic obligation only, and to some it is even less than a rabbinic obligation). It thus follows that communal prayer would be one of the mitzvot that can be overridden by the principle of *Kevod Habriyot*, particularly in light of what we mentioned above that communal prayer is simply a means of getting our prayers answered but not part of the essence of the mitzvah of prayer, which can also be fulfilled without a minyan, and is thus not as strict as other rabbinic mitzvot and not obligated in any case of *Ones* or *Dachak*.

20. *Mishlei* 3:17. See *Teshuvot Haradwaz* 3:627, for an example of this principle being used to decide difficult cases by favoring the more pleasant behavior.

trouble to others and creating a *chillul Hashem* – a Torah prohibition – also overrides communal prayer.²¹ Indeed, the Gemara emphasizes that the severity of *chillul Hashem* is so great that important mitzvot, including honoring one's Torah teacher, are pushed aside in order to avoid causing a *chillul Hashem*. The Gemara also states, "It is preferable that a letter of the Torah be uprooted than to desecrate the Name of Heaven in public."²² It is usually a *kiddush Hashem* to do a mitzvah in public, but where performance of the mitzvah itself causes disruption and angers co-passengers, it must be viewed as a *chillul Hashem*.

For both of these reasons, in addition to other potential problems, such as proximity to a lavatory or inappropriately dressed members of the opposite gender, praying alone quietly in one's seat²³ seems to be more desirable in this instance than communal prayer. After all, communal prayer is primarily a means to cause *Hashem* to look favorably upon our prayers, which cannot be expected if our prayers disturb others and cause an inappropriate scene that only serves to damage the divine name rather than sanctify it. This logic should apply even to one who has to say *kaddish*, in which we pray, "*yitgadal v'yitkadasch shmei rabba* – may His great name be exalted and sanctified."²⁴ It does not make sense to make such

21. *Leviticus* 22:32.

22. *Yevamot* 79a.

23. Regarding prayer on an airplane, Reb Moshe rules that if it is difficult to stand during prayer it is best to sit in one's seat while praying, *Iggerot Moshe* OC 4:20. See also *Halichot Shlomo*, *Hilchot Tefillah*, p. 95 (4).

24. The custom for a mourner to recite *kaddish* only has the status of a "*minhag b'alma*," not a *mitzvah d'rabbanan*, even though it is based on important rabbinic sources, as the *Birchei Yosef* states in YD 240:8 as well as *Responsa Maharil* 64. The *Badei Hashulchan*, *Biurim* 376:4, notes that the language used by the Ramo regarding the mourner's *kaddish* implies that the foundation of the obligation is a custom. Rav Ovadia Yosef notes in *Yabia Omer* 3:YD 26, that the custom of saying *kaddish* is very important and should not be taken lightly, as it has been done by all Jewish communities for many generations, and is solidly based in *Chazal*. Indeed, *Badei*

a prayer if it is done in a manner that disparages and desecrates His name. If one is able, however, to make a minyan on an airplane in a location and manner that does not disturb anyone, not only should it be done, but it can serve as a true *kiddush Hashem* – sanctification of His name.

Gezel Sheina

Airplane flights are often very long overnight journeys during which most people attempt to get some sleep. On some routes a minyan often starts to form as soon as light begins to break through the windows, despite the fact that most passengers are still trying to sleep. In addition to disturbing the flight crew and blocking aisles, another negative consequence of the movement and noise that these minyanim generate is waking and disturbing sleeping passengers. The term “*gezel sheina*” has become a common phrase to describe a prohibition against waking another person who wishes to sleep. However, it seems that this prohibition is not taken very seriously by the general public. While waking other passengers is clearly inappropriate and unfair, we will now

Hashulchan suggests that the obligation to say *kaddish* for one’s parents may be based on the obligation to honor one’s parents. (The same argument is made by *Shearim Metzuyanim B’halacha* 4:143 (7), and *Yabia Omer* 7:OC 10). The level of the obligation to honor one’s parents after their death is a matter of dispute, with important authorities on both sides of the question of whether it is rabbinic or biblical. However, whichever way one rules, the obligation to say *kaddish* is much more than merely a custom. Nevertheless, it is hard to argue that the level of this obligation overrides the serious Torah prohibition against causing a *chillul Hashem*.

Furthermore, since the obligation is only based on the connection to honoring one’s parents, then, if the act is done in a way that would not bring honor to one’s parents, it should not be done. Furthermore, the *Shiurei Brachah* (YD 376:4) argues that the idea that one must say *kaddish* eight times per day is based on a mistaken understanding of the *Zohar*. He quotes Rav Chaim Vital that the proper understanding of the *Zohar* is that one need recite *kaddish* only once a day. One could thus simply say *kaddish* before or after the flight, and will not lose anything by not saying it with a minyan during the flight.

examine if there is such an actual prohibition, and, if so, the nature of such an *issur*.

Rav Wosner writes in his responsa *Shevet Halevi* that although *gezel* (theft) is only prohibited when an actual object is taken, there is nevertheless some prohibition of causing another to lose sleep.²⁵ However, Rav Menashe Klein argues in his *Mishneh Halachot* that in fact there can be *gezel* of a non-tangible object.²⁶ This position is based on the *Tosefta* in *Bava Kama*, which lists seven types of thieves, all of whose theft involves some sort of trickery, not stealing a physical object.²⁷

Indeed, *mussar* sources refer to disturbing another's sleep as being a worse form of theft than stealing mere possessions.²⁸ This is because taking away someone's sleep actually affects his body, not just his belongings. Furthermore, it is recounted that the Chafetz Chaim would warn people not to wake others, arguing that, "Disturbing anyone's sleep is robbery for which restitution cannot be made (*gezeila sh'ain la hashava*)."²⁹ It is told about R. Yisrael Salanter that one morning he criticized one of his students for going out to get water to wash his hands by passing by his neighbors' apartments while they were still sleeping, arguing that, "*netilat yadayim* is only a rabbinic decree, whereas stealing someone's sleep is prohibited by the Torah!"³⁰

As a source for the prohibition of "*gezel sheina*," Rav Klein cites a Gemara in which Rav Nachman said to his servant that if he sees him falling asleep while reciting the first verse of the

25. *Shevet Halevi* 7:224. Rav Wosner also points out that this prohibition is particularly serious regarding people who are ill, in which case awakening them is not just a case of stealing their sleep, but may in fact be stealing their health (*g'zeilat briutam*).

26. *Mishneh Halachot* 12:443.

27. *Tosefta, Bava Kama* 7:8.

28. R. Avigdor Nebenzal, *Sichot L'sefer Vayikra*, 293; *Ahavat Chinam*, 152.

29. R. Chaim Ephraim Zaichyk, *Hameorot Hagedolim*, p. 376 (1962 edition).

30. *Ibid.*, p. 38.

shema, he should prod him in order to wake him up, but for the rest of the *shema* he should just let him sleep.³¹ Rav Klein argues that this shows that to disturb someone and wake them up, even to recite the rest of *kriyat shema*, is prohibited.³²

Another possible source for the prohibition of *gezel sheina* is a Mishnah which rules that if one resident of a courtyard sets up a store in that courtyard, the other residents can stop him by claiming that they will not be able to sleep due to the noise of the customers.³³ This clearly indicates the problematic nature of disturbing people's sleep, a disturbance which the Meiri refers to as "*hezek sheina* – damaging another's sleep."³⁴

Additionally, the Gemara states that a Noahide incurs the death penalty for theft of even minimal amounts. The Gemara suggests that this is so because of the anguish that the act of theft caused at the time of the robbery.³⁵ We thus see that a fundamental part of the prohibition of theft is the pain and anguish caused to the person being robbed. While the term *gezel sheina* implies that the problem involves some sort of theft, it becomes clear from the above sources that the primary concern may actually be the damage, or pain being caused to others by disturbing their peace.

We are therefore led to the conclusion that waking people up or disturbing them is not only forbidden as a form of theft, but also as a serious biblical prohibition known as *ona'at devarim*. This prohibition, based on the verse, "*v'lo tonu ish et amito*, each of you shall not maltreat his fellow"³⁶ is that one may not cause pain or discomfort to others through speech.³⁷

31. *Berachot* 13b.

32. *Mishneh Halachot* 12:443-444.

33. *Bava Batra* 20b.

34. Meiri, *Bava Batra* 20b.

35. *Sanhedrin* 57a.

36. *Vayikra* 25:17.

37. *Bava Metzia* 58b.

Prominent *rishonim* extend this prohibition to causing any sort of pain, not only that which is brought about by words.³⁸ Based specifically on this prohibition, many *poskim* have concluded that “it is forbidden by the Torah to wake someone from their sleep.”^{39 40}

Regardless of which prohibited category *gezel sheina* falls into, it is taken very seriously by *poskim* and has many ramifications in practical halacha. Should one wake up a sleeping person so that he may pray with a minyan? The basic principle in this regard is that a person may only be awakened if it is to afford him the opportunity to perform a biblical obligation, or if it is known that he would be upset if not awakened; in all other cases waking him would be prohibited.⁴¹ R. Shternbuch reasons that the cases in which one may wake someone are based on the assumption that he would be distressed by having slept through the time to perform that particular mitzvah, but if one is in doubt regarding the sleeping person’s preference, he must not be disturbed. R. Shternbuch concludes that one should waken someone to pray with a minyan only if one is certain he wants that.⁴²

It is certainly prohibited to wake a person who does not

38. *Sefer Yeraim* 180; *Shaarei Teshuva*, 3:24; *Sefer HaChinuch* 338. See also *Chaye Adam* 143; *Iggerot Chazon Ish* 3:165; *Chafetz Chaim*, *Be'er Mayim Chaim*, Intro 14.

39. *Keren L'dovid* OC 18; *Darchei Choshen* 235; *Pitchei Choshen* 4:15 fn. 3 s.v. “*B'sefer*;” *Shulchan Aruch Hamekutzar* 8:217.

40. It is interesting to note that the Gemara (*Bava Metzia* 58b) uses an argument in regards to the severity of *ona'at devarim* that is very similar to the one used by *mussar* sources concerning the prohibition of *gezel sheina*. The Gemara writes, “*ona'at devarim* is a worse transgression than *ona'at mammon*...R. Elazar says it is because this one affects one’s body, while this one only affects one’s possessions. R. Shmuel b. Nachmani says, this [*mammon*] can be returned, and this [*devarim*] cannot.”

41. *Keren L'Dovid*, OC 18.

42. *Teshuvot V'hanhagot*, 2:50.

want or need to be awakened. The fact that letting a person sleep overrides giving him the opportunity to do certain mitzvot indicates the profound significance that halacha places on not disturbing another person's sleep. In fact, Rav Chaim Pinchas Sheinberg has ruled that if one would have to wake another person up in order to get to the minyan or to get to his *tallit* and *tefillin*, he should simply stay in his seat and miss out on both, in order to avoid waking his seatmate.⁴³

We thus see that disturbing others, particularly while sleeping, is clearly prohibited by the Torah. It is seen as a form of theft, and by some as even worse than stealing an object. It also falls into the category of *ona'at devarim*, (distressing someone) and its avoidance is seen as a fulfillment of "*v'ahavta l'ræcha k'mocha* – love your neighbor as yourself."⁴⁴ One who disturbs the sleep of others in order to fulfill the mitzvah of communal prayer may thus fall into the classic category of "*yatza s'charo b'hefseido* – his gain is offset by his loss."⁴⁵

We can conclude that although communal prayer is a fundamentally important religious requirement, there are other fundamental religious requirements that may take precedence at certain times. It is easy to favor ritual obligations, but we must not lose sight of the magnitude of our ethical responsibilities.

43. *Kuntres U'velechtechah Baderech*, 5:7 fn. 56. Rav Sheinberg argues that waking another person up is a serious prohibition, thus making them *anus* regarding *tallit* and *tefillin*; regarding *tefillah b'tzibbur*, the entire airplane is considered one room, and a person can thus pray with the minyan while sitting quietly in his seat (see *Mishnah Berurah* 55:8 that any group in the same general room is defined as a "*tzibbur*" even if they can not see each other; and see *Iggerot Moshe* OC 4:20 that one who finds it difficult to pray with *kavvana* on an airplane may pray sitting in his seat *lechatchila*). Some *poskim*, including Rav Eliyashiv, do permit waking someone in order to get to the minyan, though they all agree that it is still not proper to do so.

44. *Iggerot Chazon Ish* 3:165; *Keren L'Dovid* OC 18; R. Avigdor Nebenzal, *Sichot L'sefer Vayikra*, 293; *Ahavat Chinam*, 152.

45. *Pirkei Avot* 5:11,12.

Wireless Networks and Halacha

Rabbi David Etengoff

Introduction

Wireless networks¹ (hereafter called Wi-Fi) have become a ubiquitous part of modern life. Wi-Fi connections are available at airports, restaurants, coffee shops, many public parks, work environments, and throughout a growing number of cities.² Publicly available connections are usually provided without charge. Commercially available connections are provided on a subscription (paid) basis. In addition, private or household-based deployment of Wi-Fi technology is one of the fastest growing areas within the consumer space.³ This relatively new technology,⁴ however, brings with it a host of secular legal and halachic concerns.

1. The technical term for wireless networks is Wi-Fi. This refers to the industry standard known as wireless fidelity. It is also known as the IEEE 802.11 standard. This allows a user with a Wi-Fi enabled device such as a laptop or notebook computer or a PDA (Personal Digital Assistant) to log on to (gain access to) the Internet to surf the World Wide Web and to check E-mail-all without the encumbrance of a wired connection.

2. Cerritos, California, became the first US city to implement this technology in April, 2004. It was followed by Grand Haven, Michigan in July of 2004. Other cities actively involved with Wi-Fi planning include New York, San Francisco, Philadelphia, and post-Hurricane Katrina New Orleans.

3. The number of households using Wi-Fi wireless technology for home networking has surpassed the number using Ethernet [wired] according to Global Digital Living, a recent survey by Parks Associates. This study, which surveyed consumers on technology adoption and use, found 52% of U.S. households with a home network use Wi-Fi and 50% use Ethernet.”

4. The first version of Wi-Fi, IEEE 802.11b, was developed in 1997.

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Secular Legal Issues

On April 20, 2005, Benjamin Smith III parked his SUV in front of veterinarian Richard Dinon's home in Tampa Bay, Florida. He then proceeded to utilize Dinon's unsecured⁵ Wi-Fi connection and did so for a significant period of time. Dinon called the police, who then arrested and charged Smith with unauthorized access to a computer network, a third-degree felony in the state of Florida. Smith was later convicted on this charge. There is no indication whatsoever that Smith harmed Dinon's network in any way or damaged any of his data.⁶ The crime consisted solely in Smith's unauthorized access of Dinon's Wi-Fi signal. Unfortunately for him, he was the first person in his state to be arrested, indicted, and convicted under the 2003 Florida Statute known as the "Florida Computer Crimes Act," Chapter 815.06 (1) (a) that reads: "Whoever willfully, knowingly, and without authorization: Accesses or causes to be accessed any computer, computer system, or computer network; commits an offense against computer users."

Federal law as found in the Computer Fraud and Abuse Act

5. There are a number of technologies that are available to secure a wireless network. None of them, however, can absolutely guarantee 100% security. Dinon's network did not employ any of these technologies and thus was an easy target for Smith's "piggy-backing" on his network.

6. Although to my knowledge no one has yet been arrested in Pennsylvania for the selfsame crime, this state, too, maintains that unauthorized access of a computer network is, in and of itself, a felony. See Pennsylvania Consolidated Statutes, Crimes and Offenses (Title 18), Chapter 39. Theft and Related Offenses, Section 3933. Unlawful use of a computer, (a) (2): "Offense defined.—A person commits the offense of unlawful use of a computer if he, whether in person, electronically or through the intentional distribution of a computer virus: intentionally and without authorization accesses...any computer, computer system, computer network...In contrast, New York State requires the intent to subvert security measures in place or to do harm, and not merely unauthorized access to be guilty of a felonious charge. See New York State Penal Law, Article 156, Offenses Involving Computers, Section. 156.05 and Section 156.10.

(18 U.S.C. 1030), as well, provides ample possibilities for arresting and prosecuting someone who “piggy-backs” on someone else’s Wi-Fi signal without their permission – especially given the lack of definition for a number of crucial terms.⁷ The potential for committing a federal felony for merely accessing someone’s Wi-Fi signal in an unauthorized manner is succinctly stated by Mark Rasch, Esq., a former head of the Justice Department’s Computer Crime Unit:

So if the government wanted to throw you in jail, it could argue that, by getting free Internet, you were accessing the provider’s computer without authorization (and that you knew or should have known it was without authorization or in excess of authorization) and you thereby obtained some information from the computer. Sure, that statute was intended to go after data thieves. But the access necessarily shares some data -- IP, routing, etc -- between the computers, and the statute does not specify exactly what information must be obtained. That means you've potentially committed a felony.⁸

What emerges from this discussion is the clear potential for committing a federal or state felony for the seemingly innocuous act of merely accessing someone’s unsecured Wi-Fi signal without permission, even if this act does not eventuate in any harm or damage of any kind. On a parallel note, England, as well, has two national laws entitled the Computer Misuse Act and the Communications Act that have been used since 2005 to prosecute and convict individuals who illegally use other people's unsecured Wi-Fi connections.⁹ Given all of

7. Robert V. Hale II, Esq., “Wi-Fi Liability: Potential Legal Risks in Accessing and Operating Wireless Internet,” *Santa Clara Computer and High Technology Law Journal*, Volume 21, page 545. This seminal paper is downloadable via hyperlinks from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=692881.

8. “Wi-Fi High Crimes,” May 3, 2004 located at: <http://www.securityfocus.com/columnists/237>.

9. See the August 23, 2007 Reuter’s report located at: <http://>

the aforementioned, the question that we must ask at this juncture is: "What are the potential halachic ramifications of such an act?"

Halachic Issues

Geneivah – Stealing

The Rambam introduces *Hilchot Geneivah* with a listing of seven different specific obligations and prohibitions that fall under this rubric. First among them is "*shelo ligoov mammon*" (the prohibition of stealing money). In 1:1, he formulates the general prohibition of *geneivah* (stealing) in the following manner: "Anyone who steals money worth a *perutah* or more violates a negative prohibition. As the Torah states: 'You [plural] should not steal' ('*lo tignovu*')."¹⁰ In 1:2, the Rambam notes that it is forbidden by biblical law to steal anything at all, even if its value is less than a *perutah*. It should be noted that stealing money, or the value thereof, whether in the Talmud or in the corpus of the Rambam's writings, and the works of subsequent *poskim* (halachic decisors), always refers to personal property (in contrast to real property which connotes real estate). This money or property is physically perceivable and theoretically accessible, in some form, by one or more of the five senses. As such, it initially might appear that the

/management.silicon.com/government/0,39024677,39168244,00.htm that summarizes the events leading to Scotland Yard's arrest of a 39-year old man "who Officers spotted... using a laptop as he sat on a wall outside a house in Chiswick, West London."

10. The standard printed edition of the *Mishneh Torah* has "*lo tignov*" (*Sefer Shemot* 20:12) instead of "*lo tignovu*" (*Sefer Vayikra* 19:11) as found in the Rabbi Shabetai Frankel edition. This appears to have been a scribal error since the Rambam in his *Sefer Hamitzvot*, Mitzvah 244, quotes *Sefer Vayikra* rather than *Sefer Shemot*. This is congruent with Rashi's (1040-1105) well-known comment on the verse in *Sefer Vayikra* wherein he points out that the *Sefer Shemot* verse refers to kidnapping whereas the other verse refers to stealing money. Moreover, in the discussion in *Sefer Hamitzvot*, the Rambam quotes the *Mechilta d' Rabbi Yishmael* that notes that "*lo tignovu*" refers specifically to stealing money (something of monetary value).

definitional structure of this halacha has little or nothing to do with the unauthorized use of someone's unsecured Wi-Fi service.

Let us, however, analyze what actually happens when someone uses his or her Internet connection. Private individuals with Internet connectivity, in any form, must pay for their service through a contractual arrangement with an ISP (Internet Service Provider). This agreement entails the payment of a monthly fee for a certain amount of access to the Internet. This access is called "bandwidth." Bandwidth is conceptually similar to a pipe through which water flows. The wider the pipe, the greater the amount of water that is capable of flowing through the pipe. This is the case, as well, in reference to the amount of bandwidth for which one contracts. In this instance, the greater amount of bandwidth, the greater the speed of Internet access and the more powerful the data signal will be. In summary, greater bandwidth translates into a more rapid and robust Internet connection. This is crucial when the content is multi-media based – such as video or music material. The number of simultaneous users, however, and the manner in which the bandwidth is utilized, greatly affect the quality of the Internet experience. The downloading of large files (for example, illegal movie downloads) and multi-media based usage of the bandwidth, has the very real potential to impact negatively upon the Internet experience of all other users.

Given all of the above, it seems that using a private individual's Wi-Fi connection without permission is indeed a form of *geneivah*. By definition, when a person "piggy-backs" on someone else's wireless Internet connection, they diminish the available bandwidth. Sometimes, the signal diminution is limited, as in the case of merely browsing the World Wide Web or checking one's E-mail. In other cases, the reduction in available bandwidth (i.e. signal strength), as suggested above, can be very consequential. In all cases, however, it certainly appears that the contracting party has suffered a financial loss

that may well be a *perutah* or more in value. This is the case since the lessee has been denied full access to the bandwidth he has leased. In a very real sense, it has literally been taken away from him. This act of misappropriation, therefore, appears to be well within the halachic parameters of *geneivah*. As such, it appears to be at least rabbinically proscribed, if not biblically prohibited.

The Interplay Between Torah and Secular Law

Another fundamental halachic issue in the unauthorized access of someone's unsecured Wi-Fi connection appears to be the potential of violating *Dina De'Malchuta Dina*.¹¹ Rabbi Hershel Schachter stresses that this concept is far narrower in scope than is often assumed. It is by no means to be taken at face value. To do so would be absurd: "...for it would reduce Judaism to a practice of rituals alone, and would effectively nullify about half of the *Shulchan Aruch*."¹² He continues his general analysis of this principle by stating:

Rather, we take the principle "*Dina de'malchuta dina*" to indicate that in certain *areas* and under certain, specific *circumstances*, the halacha requires that we be governed by the dictates of the sovereign state in which we live rather than by the teachings of the Torah alone.¹³

11. See Rabbi Hershel Schachter's article in this journal entitled: "*Dina De'Malchuta Dina: Secular law as a Religious Obligation*," Volume I No. I, Spring, 1981, pages 103-132; Menachem Alon's *HaMishpat Halvri*, Chapter I, Volume I, pages 48-59 ("*HaYachasim shebain HaMishpat Halvri uvain HaMishpat HaZar*"), and *Encyclopedia Talmudit*, Volume VII, s.v. "*Dina De'Malchuta Dina*" for thorough coverage of this crucial and often misunderstood area of halacha.

12. Rav Schachter, op. cit. , p. 105. For a relatively early presentation of this view see Rabbi Menachem ben Shlomo Meiri's magnum opus, *Beit HaBechira*, *Baba Kama* 113b, s.v. "*kol mah sheamarnu*," and *Beit HaBechira*, *Avodah Zarah*, 16a, s.v. "*Hamishnah HaShiviit*." The Acharonim share this view as well. See, for example, *Shach in Shulchan Aruch, Choshen Mishpat*, 73:39.

13. Rabbi Schacter, op. cit. p. 105.

He concludes that there are, in actuality, three general areas wherein *Dina De'Malchuta Dina* applies: the taxation function of government, minting coins, and, most significantly, “the right of any government, Jewish or non-Jewish, to punish criminals as they see fit for the purpose of keeping law and order.”¹⁴ The latter right of any government to maintain law and order appears to present the greatest problem for unauthorized and unsecured Wi-Fi access.

The 17th century *posek* Rabbi Shabtai ben Meir Ha-Cohen (*Shach*) in *Shulchan Aruch, Choshen Mishpat* 73:36, brings the opinion of Rabbi Abraham ben David (Ravad), as found in a responsum of the Ramban. Therein Ravad states: “So, too, I hereby state that in all matters wherein the law is not explicit among us and there exists no known custom [as to how to proceed] we follow in that matter after their customs since this then approximates *Dina De'Malchuta Dina* as they adjudicate their cases based upon their customs.”¹⁵ The *Shach* clearly maintains this view as a matter of practical halacha.

Halacha, of course, never ruled upon the use and misuse of wireless networks any more than it decided upon laws pertaining to corporations or the Futures and Options market of the Chicago Board of Trade.¹⁶ Therefore, according to the Ravad, the Ramban, and the *Shach*, we must follow secular law in these and other kindred matters. If so, as suggested above in the first section of this article, it is quite probable that the common practice of “piggy-backing” upon another’s Wi-Fi access point signal may very well entail violations of federal,

14. *Ibid.* , p.117.

15. So, too, in *Choshen Mishpat* 73:36 the *Shach* states: “Only in those matters that are not explicit to us do we learn from *Dina De'Malchuta Dina* but not in those areas that are explicit in our laws.”

16. The Chazon Ish strongly disagreed with this view of the *Shach* and stated that any issue that may arise for all time may be adjudicated based upon the principles of talmudic law. See the Chazon Ish’s own statement of this view in *Choshen Mishpat*, essay 16 on miscellaneous topics, section 1 (Rabbi Schachter, pages 124-125).

state and Jewish law depending upon the jurisdiction wherein the unauthorized access took place.

Is *Dina De'Malchuta Dina* Applicable When Laws Are Unenforced?

Our discussion until this point has been predicated upon the supposition that *Dina De'Malchuta Dina* is applicable in all instances wherein a particular statute exists on the *de jure* level. Yet, what if the law is unenforced on the *de facto* level? That is, what if, for all intents and purposes, the law is ignored in practice? This is not simply an academic question, as is noted by Law Professor Tim Wu of Columbia University:

American law is underenforced—and we like it that way. Full enforcement of every last law on the books would put all of us in prison for crimes such as "injuring a mail bag." No enforcement of our laws, on the other hand, would mean anarchy. Somehow, officials must choose what laws really matter.

The rationale for the lack of enforcement of a variety of laws lies beyond the expense that would accrue in the pursuit of the enforcement process. Instead, there is a "deeper and underlying logic:"

Tolerated lawbreaking is almost always a response to a political failure—the inability of our political institutions to adapt to social change or reach a rational compromise that reflects the interests of the nation and all concerned parties. That's why the American statutes are full of laws that no one wants to see fully enforced—or even enforced at all. Sometimes a law was passed by another generation with different ideas of right and wrong, but the political will necessary to repeal the law does not exist. Sometimes, ... the issue is too sensitive to discuss in rational terms. And sometimes the law as written is a symbol of some behavior to which we may aspire, which nevertheless remains wholly out of touch with reality. Whatever the

reason, when politics fails, institutional tolerance of lawbreaking takes over.

Professor Wu notes that “institutional tolerance of lawbreaking” is, somewhat paradoxically, a fundamental aspect of the American legal system. In addition, it is a major factor in “creating social and legal policy.” Moreover, it is essential to effective functioning of the legal system:

... tolerance of lawbreaking constitutes one of the nation's other major—yet most poorly understood—ways of creating social and legal policy. Almost as much as the laws that we enact, the lawbreaking to which we shut our eyes reflects how tolerant U.S. society really is to individual or group difference. It forms a major part of our understanding of how the nation deals with what was once called "vice." While messy, strange, hypocritical, and in a sense dishonest, widespread tolerance of lawbreaking forms a critical part of the U.S. legal system as it functions.¹⁷

In summary, there are manifold areas of American law that are *de facto* unenforced, or at the very least, underenforced. Thus, in practical terms, these laws are non-existent.

Samuel is the talmudic sage cited in discussions of the term and application of *Dina De'Malchuta Dina* see *Gittin* 10b and *Nedarim* 28a). He formulated it in response to the practical realities encountered by Jews living in the Diaspora. Rabbi Dr. Leo Landman notes that:

... Samuel recognized that strict adherence to the corpus of Jewish law would create problems in Diaspora life. He realized that it is difficult for the Jew to live in any foreign state, be loyal to the laws of the state and at the same time remain true to the juridical principles of his own faith. These two systems of jurisprudence were bound to clash

17. <http://www.slate.com/id/2175730/>.

and unless some accommodations were made, Jewish survival was threatened. Some accommodations were necessary and as a result the principle of *dina d'malkuta dina* [sic] evolved.¹⁸

Building upon Rabbi Landman's conceptualization of *Dina De'Malchuta Dina*, it appears that those areas of American law that are *de facto* unenforced, would never have been included in Samuel's pragmatically conceived idea, since no clash exists. The core of his concept was to practically, rather than theoretically, enable Jews to live in often-hostile environments. In most instances, however, there is no law enforcement agency, be it the local police or a federal agency, that has created a monitoring system to catch violators of unauthorized and unsecured Wi-Fi access.

In realistic terms, therefore, the laws that have been enacted, on both the state and federal level, may very well not fall under the rubric of *Dina De'Malchuta Dina*. As result, from this perspective, the unauthorized use of someone's unsecured Wi-Fi signal may well be allowed.

Further support for the above-stated approach may be indirectly garnered from a responsum written by Rav Eliezer Yehudah Waldenberg z"l. In *Tzitz Eliezer*, vol. 18, section 80, Rav Waldenberg responded to an inquiry submitted by the noted Israeli bio-medical ethicist, Dr. Avraham Sofer Avraham. Dr. Avraham's query focused specifically upon the question as to whether or not one is allowed to photocopy copyrighted material, such as books or articles, for study and purely private use. Private use in this instance is defined as use without intention or desire to sell the photocopied material or benefit in any other financial fashion. The question is a matter of serious import, since nearly all published works, whether in Hebrew or English, are replete with wide-ranging

18. "DINA D'MALKUTA DINA: Solely a Diaspora Concept," *Tradition*, Vol. 15, 3, 1975, p.89.

warnings against violating the rights of the copyright holder in any manner.

Rav Waldenberg utilized two approaches in responding to Dr. Avraham's question: Logic (*sevarah*) and halachic precedent (*kra*). It is the former approach that I wish to explore. In developing his rationale for allowing photocopying of copyrighted material for private use, Rav Waldenberg employed two ideas: *minhago shel olam* (normative practice) and *hamotzi l'or yodeah mizeh* (the author knew full well upon making the work public how it would be used). Rav Waldenberg's logic is pragmatic and practical on both accounts. It is, therefore, consonant with the intent and essence of Samuel's dictum of *Dina De'Malchuta Dina*. Taken in tandem, these concepts entail an answer to the question: "What do people do?" That is, every author of every type of literature knows full well that his copyrighted article or book will, in fact, be photocopied by scholars and other interested parties for their research needs. Thus, Rav Waldenberg states:

By definition, [the author as a result of publishing his work] has thereby abandoned all claims and given up all subsequent rights from the very beginning regarding all manner and variety of copying in any and all forms for purely private use. This means that we can legitimately surmise that it was the author's full intention to do so, even though he has issued a general warning statement proscribing the copying of any portion of the book or writing in question – without his explicit permission. This is the case since he never intended to forbid this right of use...

Rav Waldenberg further underscores the warning against copyright violation as referring to commercial gain, rather than private use, when he states:

Moreover, the basis of his copyright infringement warning is to prohibit copying for the express illegal purpose of trampling upon the author's rights (*hasagat*

gevul) or plagiarizing the author's work. None of this, however, is relevant when the purpose of this copying is for study and personal use. (All translations, my own)

I believe we can extrapolate from Rav Waldenberg's position to our case of the misappropriation of someone's unsecured Wi-Fi signal in the following manner: It is true that this act is *de jure* proscribed. The mere fact, however, of the access point's owner electing to forgo the easy and obvious steps necessary to secure his wireless connection constitutes a *de facto* invitation to freely use his equipment and Internet connection. This "invitation", it would appear, would logically extend to someone else's private use. Any access point's owner would surely raise powerful objections, however, if someone willfully took advantage of his open door policy and sought financial gain at his expense. As such, we have a nearly direct parallel to photocopying copyrighted material for private study and use. In conclusion, it is very possible that such a scenario would not entail violations of *Dina De'Malchuta Dina*.

An Ethical Issue

A very clear ethical issue, however, remains: The Internet service provider's (ISP) contract, in nearly all cases, is exclusive in nature. Therefore, the ISP has granted right of use solely to the paying subscriber (and members of his household). Theoretically, then, the ISP could cancel the subscriber's contract due to the implicit breach of contract that is entailed by unsanctioned use of the service. Moreover, if the unauthorized user uses the Internet for illicit purposes such as child pornography, the subscriber could become the subject of legal action. These concerns led Rabbi Dr. Asher Meir of the Business Ethics Center of Jerusalem to state:

At the other extreme, some people piggyback without permission. Here again there is no real ethical dilemma; the service belongs to the subscriber and no one else has a right to take advantage of it without his permission.

Subscribers have good reason to object to piggybacking, even though they pay for unlimited use. In particular, piggy-backing can lead to security breaches for the subscriber or to service interruption or even litigation if the hitchhiker does something which seems improper.¹⁹

Conclusion

The goal of this paper has been to been to delineate some of the potential secular, halachic, and ethical issues that can be encountered when one accesses an unsecured Wi-Fi signal in an unauthorized manner. Based upon the sources that have been presented, it appears that this seemingly innocuous act could, in fact, entail a number of violations of federal, state, and Jewish law depending upon the jurisdiction and country wherein the unauthorized access took place, and the extent of the applicability of Samuel's law of *Dina De'Malchuta Dina*. In terms of actual practice, however, the reader is urged to seek the guidance of an Orthodox rabbi.

19. "Piggyback or Just Piggy?" located at [http://www.aish.com/societyWork/work/The_Jewish_Ethicist_Piggyback_or_Just_Piggy\\$.asp](http://www.aish.com/societyWork/work/The_Jewish_Ethicist_Piggyback_or_Just_Piggy$.asp) , page 1.

Coffee, Pizza and Hard Cheese: Eating Meat After Dairy

Rabbi Moshe Walter

The Torah in three places mandates against cooking a kid in its mother's milk.¹ Sinaitic tradition teaches that the laws of milk and meat are not specific to a kid in its mother's milk, but, instead, have broader application. The sages teach that the Torah's repetition of this rule three times is to convey three distinct elements of the prohibition against a mixture of meat and milk: the independent prohibitions against cooking, consumption and benefit.²

In order to biblically violate the prohibition of eating milk and meat, the two items have to be cooked together. Meat and dairy prepared in any other manner are prohibited for consumption by rabbinic law only.³ *Chazal*, however, added other restrictions and additional layers to the laws of eating milk and meat.⁴ One of the restrictions is the required waiting period between eating meat and dairy products.

The Gemara in *Chullin* quotes Rav Chisda, who stated that "one who ate meat is forbidden to eat cheese."⁵ One who ate

1. *Shemot* 23:14, 34:26 and *Devarim* 14:21.

2. *Chullin* 115A.

3. *Yoreh Deah* 87:1.

4. Rabbinic law also prohibits eating foul or chicken cooked with milk and is codified in *Yoreh Deah* 87:3. For the sake of clarity the word "meat" in this essay will always connote fowl as well as meat unless otherwise indicated.

5. The Gemara's choice of using the word "cheese" as opposed to milk may be of importance, as will be dealt with later. Until then, the word

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cheese may eat meat." The Gemara offers no explanation or reason why a person may not eat cheese after meat, nor does the Gemara comment upon the distinction between eating cheese and then meat, which is permitted, as opposed to eating meat and subsequently cheese, which is prohibited.

The *Rishonim* provide two opinions why cheese may not be eaten after meat. Rashi explains that meat leaves a fatty residue in the throat and palate, while Rambam explains that particles of meat may become lodged between the teeth.⁶ As a result, if a milk product is eaten after the consumption of meat, the fatty residue and meat particles may combine with the dairy food.⁷ Surprisingly, the *Rishonim* do not explain why one may eat meat immediately after consuming dairy.⁸ The

"milk" will be used to include all types of dairy products.

6. Rashi, *Chullin* 105A, and Rambam, *Laws of Ma'achalot Assurot* 9:28. There are a number of distinctions between the two reasons given by Rashi and Rambam that have halachic significance which are beyond the scope of this essay. The *Shulchan Aruch* in *siman* 89:1 rules that one should follow both theories. See *Taz* 89/1 and *Shach* 89/2, who address this directly. See also note 27.

7. The question of how long after eating meat may one eat milk is a major dispute among the authorities. The *Shulchan Aruch* in *Siman* 89/1 quotes the opinion of the Rambam that one must wait 6 hours between eating meat and then milk. The Ramo in his gloss on the *Shulchan Aruch* quotes from other *Rishonim* the practice that one may recite the *bentching*, clean his mouth and may then immediately partake of milk products. The Ramo then mentions a second suggestion which he assumes is the "prevalent custom" of waiting one hour between eating meat and milk. The Ramo concludes that those who are careful wait 6 hours before eating milk products and finishes by saying that this is the appropriate thing to do. Both *Taz* 89/2 and *Shach* 89/9 quote the Maharshal, who writes that anyone who has the "spirit of Torah" should follow this practice and this is the accepted tradition among the majority of Jews unless one's tradition is clearly otherwise. The often mentioned custom of waiting 3 hours between meat and milk is hard to document; however, there are certain Ashkenazic communities who have a clear tradition of following one of the two customs quoted by the Ramo above. A possible source could be found in *Rabbeinu Yerucham: Issur V'heter* 39.

8. There are, however, three other conditions which must be met if one is to eat meat after eating milk, which will be addressed later in this essay.

silence of the *Rishonim* may lead to the conclusion that meat leaves fatty residue in the mouth or gets stuck in one's teeth whereas dairy products do not.⁹ As a result, one is permitted to eat dairy products and immediately thereafter eat meat. This is clear from the *Gemara* and codified in the *Shulchan Aruch*.¹⁰ Nonetheless, the *Ramo* in his *sefer Darchei Moshe* on the *Tur*, as well as on his gloss to *Shulchan Aruch*, notes that those who are more stringent will refrain from the consumption of meat after dairy foods.¹¹ The intention of this essay is to understand the basis for the stringency of the *Ramo* and to determine what ramifications, if any, may result from the consumption of different kinds of dairy products prior to eating meat.

The *Zohar*

The *Beit Yosef* writes that those who are rigorous and refrain from meat after dairy rely on a comment of the *Zohar* which states that "anyone who eats milk and meat together, or in one hour, at one meal" will be judged and punished severely.¹² The stipulations that the *Zohar* uses to define when eating

9. The *Levush Yoreh Deah* 89/2 states this explicitly, as does the *Maadanai Yom Tov* on the *Rosh* to *Chullin* Chapter 8, *siman* 5 #3 in the name of the *Rashba* and *Haghaot Maymonegot*.

10. *Yoreh Deah siman* 89/2.

11. *Yoreh Deah siman* 89/2. According to the *Gemara* and *Shulchan Aruch* there is no required waiting period between eating meat after milk. The *Zohar*, however, argues against the *Gemara* and is addressed by the *Terumat Hadeshen Teshuva* #101, *Maharshal*, *ibid.*, *Divrei Chamudot* on *Rosh* to *Chullin* Chapter 8/23, *Responsa of Maharam M'Rothenburg* (new printing) vol. 2, *siman* 13, *Magen Avraham Orach Chaim siman* 32, *s'if* 8, and *Torat Ha'Asham* and *Torat Chatat siman* 77, respectively, in their explanation of the *Ramo*. See *Responsa Yechave Da'at* volume 3 *siman* 58, who discusses this issue at length.

12. *Beit Yosef* to *Orach Chaim siman* 173/3 *D"R Veyesh* writes that this stringency of the *Zohar* should apply equally to eating chicken after milk. However, *Pri Chadash* 89/15 and *Aruch Hashulchan* 89/9 and *Divrei Chamudot* on *Rosh* to *Chullin* chap. 8, *siman* 5/23 all argue on the extension of the *Beit Yosef*'s ruling of the *Zohar*.

meat after milk will be prohibited require clarification. Does the *Zohar* mean that one is not to eat these two products only if they are eaten together within a one-hour period and during one meal? Or is the prohibition to refrain from meat after milk consumption as long as only one of the conditions is not met? Either a person is prohibited to eat dairy followed by meat within a one-hour time period even though the meals were clearly separated, or a person is prohibited to eat both within the same meal even if the dairy products and meat are consumed after a one-hour time separation. For example, having a dairy soup, not *bentching*, waiting one hour, then continuing the meal with a piece of meat.

The simple reading of the *Zohar* would suggest that it is prohibited to eat meat after milk within a one-hour time frame even if it is within a separate meal. Moreover, even where more than one hour elapsed between eating milk and meat, the two should not be eaten within the same meal. This is the approach taken by the *Pri Chadash* and *Pri Toar* in their understanding of the *Zohar*.¹³ However, a number of rabbinic authorities maintain that the *Zohar* was concerned only that one not consume meat after milk within the same meal, even though one hour has not elapsed. These poskim suggest that the *bentching* or reciting of a *bracha acharona* would suffice in order to separate the dairy from the meat meal.¹⁴

The language of the *Zohar*, “*sha’ata chada*,” that one should not partake of meat after milk within one hour, has been interpreted differently by the halachic authorities. Many maintain that the provision of the *Zohar* is to be understood literally, which then requires a one-hour respite between milk

13. *Pri Chadash Yoreh Deah siman 89/6*, *Pri Toar Yoreh Deah siman 89/6*, and *Kaf Hachaim Orach Chaim siman 173/2*.

14. *Mishbetzot Zahav Yoreh Deah siman 89/3*, *Siftei Daat siman 89/6*. This, can also possibly be gleaned from *Beit Yosef* to *Orach Chaim siman 173 d”h v’yesh* and *Levush* to *Orach Chaim siman 173/1*.

and meat.¹⁵ However, another group of *acharonim* maintains that the *Zohar*'s use of "one hour" language should not be interpreted literally. Their conclusion is that the *Zohar* requires a distinct gap between the two meals and it would be sufficient to wait half an hour to achieve this time separation.¹⁶ Others understand that taking a walk or being involved in a Torah discussion would suffice to act as a separation between milk and meat.¹⁷

The wide range of *acharonim* who seriously consider the specific words of the *Zohar* would seem to indicate an acceptance of this stringency. In fact, the *Gra* writes explicitly that the *Zohar* is the source of the *Ramo*'s requirement to wait after eating milk followed by meat.¹⁸ However, the *Maharshal* argues vehemently against those who follow the stringency of the *Zohar* and only under certain conditions (which will be discussed below) suggests a mandatory pause between the eating of milk and meat.¹⁹

The Maharam Rothenburg

Another source which may shed light on the stringency of the *Ramo* is found in a responsum of the *Maharam Rothenburg*, who was asked about his practice regarding meat

15. This seems to be the understanding of *Shach* to *Yoreh Deah* siman 89/16, as well as *Biur H'Gra* siman 89/6. *Kaf H'Chaim* to *Orach Chaim* siman 173/2 and *Yoreh Deah*, 89/10 also requires one hour.

16. *Responsa Mahershag*, vol.1 *Yoreh Deah*, siman 13, *Pri Hadar* on *Pri Megadim* to *Yoreh Deah* siman 89/6 in *Siftei Da'at* in the name of *sefer Mateh Reuven* siman 186. He adduces 2 proofs that one hour is not to be understood literally, but could also mean half an hour. *Magen Avraham* *Orach Chaim*, siman 240/28 and *Yad Efraim*. See *sefer Hilchot Chag B'Chag* on *Shavuot*, chap. 8/52, and footnote #110 who writes that waiting half an hour is not halachically valid

17. *Sefer Hilchot Chag B'Chag* chapter 8 /51 and footnote #113.

18. *Biur Ha'Gra* to *Yoreh Deah* siman 89 /11.

19. *Yam Shel Shlomo* to *Chullin* perek 8 siman 6, *Shach* to siman 89/17 quote *Maharshal* as well.

and dairy.²⁰ The Maharam responded by stating that when he was a younger man, he used to laugh at those who would wait after eating milk products to eat meat and even believed such practice to be heretical because the Gemara and *Shulchan Aruch* make no mention of this rule. The Maharam continued to relate that once after a dairy meal he found cheese remnants between his teeth and from that day forward refrained from eating meat after milk similar to the practice of not eating dairy after meat.²¹ After reading the Maharam, one must consider what his intent was. Did he merely attempt to explain his particular practice to the questioner or did he intend his practice to filter down to the public as recommended practice? Could it be that the Maharam simply implied that just as he chanced upon cheese lodged between his teeth, so must every Jew be made aware of this possibility?

Nowhere in the text of the responsum does the Maharam comment that one should follow his practice. The language of the Maharam seems to indicate that he had a specific reason for his stringency and therefore if one felt compelled to follow this ruling, it would be the correct practice. This approach is expressed by the *Issur V'heter Ha'aruch* and Maharshal who are both explicit that this ruling is merely a stringency and not the letter of the law.²² The Maharshal also adds that this stringency should only be followed if one actually experienced an episode similar to that of the Maharam. The *Shach*, on the

20. *Responsa Maharam M'Rotheburg*. Prague edition number 616, and, in new printing, *Yoreh Deah* #13.

21. The Maharam does say that he would eat chicken after cheese. The *Beit Yosef* to *Orach Chaim siman* 173 surmises that the Maharam never saw the remarks of the *Zohar* and nonetheless was stringent not to eat meat after cheese because of what occurred to him personally. The *Beit Yosef* also points out that if the Maharam was aware of the *Zohar* he would never have permitted one to eat chicken after cheese, and therefore the *Beit Yosef* concludes that we should be stringent and not eat chicken after cheese. See earlier footnote #12.

22. *Issur V'Heter H'aruch klal* 40/10, and *klal* 57/15. Maharshal, *Yam Shel Shlomo*, *Chullin* chapter 8/6.

other hand, states explicitly that the Maharam never gives the impression that he was stringent for himself only, but, on the contrary, suggests that his ruling be accepted by all.²³ A further proof for this is the fact that the Ramo in *Darchei Moshe*, quoting the sources for his gloss on the *Shulchan Aruch*, explains that one reason for waiting to eat meat after dairy is because of the responsa of the Maharam.²⁴ Obviously, the Ramo also understood that the Maharam was verbalizing what should be public practice.

The Ramo

Both the *Zohar* and the Maharam M'Rothenburg, who are attributed as the sources for the Ramo's stringency, make no distinction at all as to what type of dairy product was consumed. As a result, the language of the Ramo, in its codification of this halacha, is vague. The Ramo states that,

there are those who are stringent not to eat meat after cheese, and such is the practice that so long as the cheese is hard one should not even eat chicken afterwards, just as one would not eat cheese after meat. There are those who are lenient, and one should not frown upon them, they should only clean out their mouths and wash their hands. However, it is better to be stringent.²⁵

The Ramo begins by stating that waiting after cheese to eat meat is a stringency, but then implies that were one to eat hard cheese the letter of the law would require one to abstain from meat for six hours.

How did Ramo decide that there should be any difference in the waiting periods based on the type of dairy product consumed? Furthermore, why is the interval between eating

23. *Shach* to *Yoreh Deah* siman 89/17. See also *Sefer Minchat Yaakov* klal 76, #8 who supports the *Shach*'s assessment.

24. *Darchei Moshe* to *Yoreh Deah* siman 89/2.

25. *Ramo* to *Yoreh Deah* siman 89/2.

dairy and then meat at times a stringency and at other times the letter of the law? Finally, when the Ramo concludes that it is preferable to be stringent, was he referring only to the eating of hard cheese, which was the latter clause in the Ramo, or even to all dairy products, with which he began his statement?²⁶

There seem to be three possible sources for the Ramo's novel ruling about hard cheese. They would also explain why delaying meat after most dairy products is only a stringency, while delaying meat after hard cheese requires a six hour waiting period. The *Taz* refers to the *machloket* between the Rambam and Rashi (mentioned here earlier) on this point and believes that a practical difference between the two opinions will have ramifications for the Ramo's ruling on hard cheese. According to the Rambam, the reason for not eating dairy after meat is that meat may lodge between one's teeth as the verse states, "The meat is still between the teeth." This reason can only be true, says the *Taz*, regarding meat as is stated in the verse, but dairy or cheese that remain between one's teeth is not called dairy. However, according to Rashi, the reason for not eating dairy after meat is because of the fatty residue that remains in one's mouth. The *Taz* states that this is also true for certain types of hard cheese (definition will be discussed

26. The *Biur HaGra Yoreh Deah siman 89 #11* states that the source of the Ramo's stringency not to eat cheese after meat stems from the *Zohar*. However, in the parentheses after these words of the Ramo (these citations also quote source material for the *Mechaber* and Ramo and are attributed to authorship by the *Shach*), the source quoted for the Ramo is the responsum of the Maharam Rothenburg; only after the Ramo quotes his ruling about hard cheese do the parentheses quote the *Zohar*. It is unclear whether the Gra's citation of the *Zohar* is also including the Ramo's statement about hard cheese as stated in the parentheses or is limited to the stringency of regular dairy. Rav Feivel Cohen in his *Badei Hashulchan siman 89/68* believes that a mistake was introduced into the printing of the parentheses, and the citation of the *Zohar* really belongs after the first statement of the Ramo, which would have the Gra and *Shach* agreeing to the source of the Ramo's first statement.

shortly).²⁷ The *Taz*'s assertion that dairy stuck between one's teeth does not have the status of dairy is striking precisely because the Maharam Rothenburg himself avoided eating meat after dairy because he was concerned about cheese lodged between the teeth.

If one does not agree with the presentation of the *Taz*, a second possibility for the *Ramo*'s source of waiting six hours after hard cheese may be based on the Maharam Rothenburg. Although the Maharam himself never mentioned the specific words "hard cheese," the *Ramo* may have understood that the concern of cheese becoming stuck in one's mouth would only be a reality when it came to hard cheese.²⁸ A third explanation of the *Ramo* is based upon a comment made by the *Chagurat Shmuel*. He postulates that the stringency of the *Zohar* to wait to partake of meat after eating dairy was only with reference to hard cheese. That was also the *Ramo*'s understanding of the *Zohar*, who then required waiting six hours after eating such cheese.²⁹

27. *Taz Yoreh Deah siman 89/4*. See *Sefer Bekoach Mayim klal 77/2* on the *Torat Chatat* who warns those who have space between their teeth, braces, and the like should be careful to floss and clean their teeth appropriately before eating meat because of the greater chance they have of actually finding dairy in those spaces. A practical difference between these two opinions will be to define the status of melted hard cheese. According to the *Rambam* one should not have to wait because melted hard cheese will not become lodged between teeth, while according to *Rashi* one should wait to eat meat because melted hard cheese will leave a strong taste in the mouth just as much as hard cheese does. The *Yad Yehuda siman 89/30* is lenient, but in the *biurim* of *Sefer Badei Hashulchan siman 89/2*, he questions this ruling based upon the position of *Rashi*. In *Sefer Hakashrut* chapter 10 footnote 121, Rav Fuchs cites that he heard from Rav Yosef Shalom Elyashiv that one must wait 6 hours after eating melted cheese like pizza. Regarding a situation where one is in doubt as to whether the cheese is hard or not, see *Kaf Hachaim siman 89/48* and *Badei Hashulchan siman 89/70*.

28. See *Sefer Torat Chatat* of the *Ramo*, *klal 76 siman 2* where it is very clear that the source for waiting longer after eating hard cheese is based upon the Maharam Rothenburg.

29. *Chagurat Shmuel*, *Yoreh Deah siman 89/18*. See as well *Aruch Hashulchan Yoreh Deah siman 89/11* who indicates a similar understanding of the *Ramo*.

Hard Cheese

The cryptic conclusion of the *Ramo* that “it is better to be stringent” is debated by later *acharonim*. However, there is a very clear consensus among the great halachic authorities of the previous generation that one need wait only after eating hard cheese but not after other dairy products.³⁰

The issue that must be addressed is the definition of hard cheese. This issue is addressed both by the *Shach* and *Taz*. The *Shach* states that hard cheese is defined as cheese that has been aged for six months.³¹ The *Taz* agrees with the condition set by the *Shach*, and adds that if the cheese is “wormy” it would also be defined as hard cheeses³² A common denominator of such cheeses is fatty residue and strong taste which remain in the mouth for a considerable time. It is hard to know which cheeses fit into one or both of these categories. That is why the halacha results in significant ambiguity. Halachic authorities of the past never enumerated which cheeses do in fact require the six hour respite as stated by the *Ramo*. The *Aruch Hashulchan* does, however, give a brief list of what he considers to be hard cheese, which includes Swiss cheese and Holland cheese.³³

This explanation of the *Ramo* is only plausible assuming that the basis for the ruling of the *Ramo* is the *Zohar*.

30. *Chochmat Adam Yoreh Deah siman 89/12 and /13, Aruch Hashulchan Yoreh Deah siman 89/11, Mishnah Berurah Orach Chaim siman 494/16 and Sha'ar Hatzion #15.* The halacha for eating meat after other dairy products will be discussed shortly.

31. *Shach Yoreh Deah siman 89/15.* This is also the view of the *Pri Chadash siman 89/16 and Pri Megadim siman 89/4* in the *Mishbetzot Zahav*.

32. *Taz siman 89/4.* From the end of the *Taz* it seems that only wormy cheese has the status of hard cheese. See also *Darchei Teshuva siman 89/34*.

33. *Aruch Hashulchan siman 89/11.* Because the basis of this halacha was codified by the *Ramo* and never discussed by the *Mechaber*, many Sephardic Jews do not have the practice of waiting after eating hard cheese. See *Responsa Yabia Omer* volume 6 *Yoreh Deah*, # 7. However, in *Sefer Hakashrut* by Rabbi Fuchs chapter 10 footnote 122, he writes that Rav Ben Zion Abba Shaul *zt"l* told him that Sephardic custom is to wait one hour. It is possible

American cheese (often referred to as yellow cheese) and its Israeli equivalent “*gevina tzehuba*” which, today, are among the most commonly consumed cheeses, are the subject of debate among the more recent halachic authorities. In his *Kitzur Shulchan Aruch*, Rav Feufer writes that most American cheese does not have an aging process of six months and is not wormy. Therefore one need not wait six hours. He then quotes Rav Aharon Kotler *zt”l* who told a talmid that “*gevina tzehuba*” does not have the status of hard cheese because the hard cheese that the Ramo was referring to was so hard that it required a heavy blade to cut it.³⁴ On the other hand, however, he notes that Rav Yosef Shalom Elyashiv requires one to wait six hours after eating hard cheese because this has become the accepted custom.³⁵

that his source is the *Shach siman* 89/16. The Chida, however, in *Sefer Shiurei Beracha siman* 89/13 requires one to wait 6 hours like the Ramo, which also seems to be the conclusion of the *Kaf Hachaim* to *siman* 89/16,47. There is a fascinating custom regarding hard cheese that is found in *Sefer Ben Ish Chaim Parshat Shilach* #15. In the *Kitzur Shulchan Aruch* of Rav Feufer *zt”l*, chapter 11 footnote 13, he writes that those who wait 3 hours between meat and milk should also wait 3 hours between hard cheese and meat. He then cites that the German practice is to wait 3 hours between meat and milk, but 4 hours between hard cheese and meat.

34. Rav Feufer quotes a written *teshuva* of Rav Moshe Stern (author of *Responsa Be’er Moshe*) printed in the *sefer Pitchei Halacha* that it is a mistake to wait at all between *gevina tzehuba* and meat.

35. Rav Feufer then quotes in the name of Rav Shlomo Zalman Auerbach *zt”l* that he does not tell others that they must wait 6 hours after eating hard cheese, but that he himself does. See *sefer Halichot Shlomo* volume 2 chapter 12/13, who quotes from Rav Auerbach that today one should wait 6 hours after eating “*gevina tzehuba*” even if it was not aged 6 months because today’s processing of such cheese is equivalent to the 6 months that earlier *poskim* referred to. See footnote #50 there for a further elaboration. See however *Moriah Journal*, Tevet 1996, where among some short responsa of Rav Auerbach he writes that today’s cheeses are not like those of the past and have the status of regular dairy products that requires a half-hour respite and cleaning of one’s palate before eating meat. The position of Rav Elyashiv can also be found quoted in the *sefer Hilchot Chag B’Chag* of Rav Karp, chapter 8 footnote #111. In footnote #118 Rav Karp writes that he heard from Rav Elyashiv that were one to take a nap between eating hard

Other Dairy Products

Now that we have determined that only hard cheese requires a six-hour interval before eating meat, let us approach the issue of eating other dairy products before meat. The *Shulchan Aruch*, based upon the Gemara in *Chullin*, gives very detailed instructions of what to do once one has finished eating dairy.³⁶ The *Shulchan Aruch* states that one must first check one's hands to inspect for dairy residue. If one eats a thicker consistency of cheese, butter or a dairy dish, there is a stronger possibility that the product sticks to the hands, and consequently the hands must be washed.³⁷ Next, one must clean his palate by eating a *pareve* item (other than flour, dates or vegetables) and then wash out his mouth well with water. Only after having followed this three-step procedure, according to the *Shulchan Aruch*, is it permitted to eat meat.³⁸

cheese and meat the required waiting period would still be 6 hours. However, when it comes to "our hard cheese" or *gevina tzehuba*, one could be lenient not to wait 6 hours were one to take a nap after eating such cheeses. See as well *Responsa Shevet Halevi* of Rav Shmuel Wosner volume 2/35, who supports waiting 6 hours for any salty or hard cheese even if they are not aged for 6 months. His reasoning is that the 6 month regulation would require a calendar of the cheese aging process. Therefore one should be stringent when it comes to any hard cheese, especially in light of the *Taz*'s conclusion that cheese is considered hard even if it has not been aged 6 months. In *Responsa V'shav V'rava*, volume 2 *siman* 26, Rav Rafael Aypris quotes a correspondence between Rav Moshe Vaye and Rav Yonason Weiner. Rav Vaye summarizes many of the basic rules regarding hard cheese and the view of many contemporary halachic authorities regarding the waiting period after eating hard cheese. He then lists over 10 types of cheeses and the exact dates of the aging process of each. Rabbi Yonason Weiner questions and proves that many of the authorities who are quoted by Rav Vaye do not actually require one to wait 6 hours after eating *gevina tzehuba*.

36. *Shulchan Aruch Yoreh Deah siman* 89/2.

37. See *Shach siman* 89/9 and /20. See *Aruch Hashulchan siman* 89/8 in the name of the *Pri Chadash*, who does not require this if eating with cutlery.

38. The *Darchei Teshuva* to *siman* 89/19 does quote from *acharonim* that one must then recite a concluding *beracha* to officially close the meal before partaking of meat. The *Mishnah Berurah siman* 499/16 writes that it is

The *Shulchan Aruch* concludes that the above is only true when one wishes to partake of meat; however, if one wishes to eat chicken there is no similar requirement to clean one's hands or palate.

A number of *acharonim* have an additional stringency. They maintain that the comment of the *Zohar* not to eat a meat meal after dairy applies equally to all dairy products and not only to hard cheese.³⁹ Although the *Zohar* never distinguished between the different types of dairy products, most previously mentioned *acharonim* maintained that the ruling of the *Ramo* to wait after eating dairy applied to hard cheese only. It is for this reason that it would appear only to be a stringency to wait to eat meat after all dairy products, and yet many individuals practice such a custom.

Shavuot

The basis for the custom to eat dairy products on Shavuot is to be found in the *Ramo*'s gloss on the *Shulchan Aruch* who writes that "the custom is in all places to eat dairy products on the first day of Shavuot."⁴⁰ Because Shavuot is one of the three

unnecessary to do so. See also *Darchei Teshuvah Yoreh Deah* 89/31 who quotes from the Rashash's commentary on *Chullin* that were one to drink milk there is only a requirement to wash out the mouth. This would mean that one could drink a cup of coffee, merely rinse the mouth, and then eat meat. See *Responsa Teshuvot V'hanhagot* volume 2/391 and *Responsa Mishneh Halachot* volume 6/135 for treatment of this case.

39. See earlier section of this article for an in-depth treatment of the *Zohar*. Those that do require a waiting period after eating dairy products debate the language of the *Zohar*'s intent to wait a full hour or half an hour. See *Kaf Hachaim Orach Chaim siman* 173/2 & *Yoreh Deah siman* 89/10 & *Pri Chadash* & *Pri Tzadik siman* 89/6 who suggest waiting. See *Responsa Yechave Daat* volume 3/58 who quotes many other opinions regarding this issue, as well as *Responsa Teshuvot V'hanhagot* volume 2/390. See *sefer Halichot Shlomo* volume 2 chapter 12 footnote 49 who quotes that Rav Shlomo Zalman Auerbach waited half an hour after dairy if he was to eat meat.

40. *Ramo* to *Orach Chaim siman* 494/3. There are many reasons given for this custom. The *Ramo* there gives his own reason, as does the *Magen*

Shalosh Regalim, there is a requirement to eat meat, as is the custom on all festivals.⁴¹ As a result, there has been a recurring debate among halachic authorities how to reconcile the requirement to eat meat with the custom to eat dairy on Shavuot.⁴² The Ramo suggests splitting the meal into two parts: the initial part of the meal should consist of dairy products, followed by a meat meal. Surprisingly, the Ramo does not mention the requirement to wash one's hands and rinse one's mouth as he codified in his commentary to *Yoreh Deah*.⁴³ Were one to eat hard cheese, certainly the requirement would be to wait six hours before eating meat.⁴⁴

The basis for solutions to this problem on Shavuot is derived from the *Zohar*'s comment that one may not eat dairy and meat in "in one hour in one meal."⁴⁵ As a result, there are those who suggest eating a dairy meal Shavuot evening and a

Avraham #6. See *sefer Ta'amei Minhagim* who cites another 5 reasons for this practice, and *Journal Mevakshei Torah*, first volume, who quotes many other reasons as well.

41. See *Pesachim* 109a, and *Rambam Laws of Yom Tov* chapter 6 halacha 17.

42. *Pri Megadim* in *Mishbetzot Zahav* to *Orach Chaim siman* 494/3 writes that one must be careful on Shavuot regarding separation of milk and meat as usual. *Mishnah Berurah siman* 494/17 cites this. See *Chok Yaakov siman* 494/11 who quotes the *Kol Bo* that one may be more lenient on Shavuot and not wait the full time between meat and then milk, but concludes that all later *acharonim* require the regular rules of meat and milk on Shavuot. This is also the opinion of *Magen Avraham siman* 494/6. See, however, *sefer Noam Elimelech, Parshat Mishpatim* who has a Kabbalistic reason that the rules of waiting between milk and meat do not apply on Shavuot as they would normally during the year.

43. The Chida in his *Machzik Beracha* to *Orach Chaim siman* 494/6 suggests that the reason that the Ramo left out those particulars and allows for meat to be eaten immediately after dairy is that his requirement was never accepted and the Ramo retracted his earlier position. The more conservative way to explain the omission of the Ramo is that the Laws of Shavuot is not the place to write about the laws of eating meat after milk. For that one is expected to look in *Yoreh Deah siman* 89.

44. *Mishnah Berurah Orach Chaim siman* 494/16 and *Shaar Hatzion ibid.* /15 also support such a practice.

45. See, for example, *Shlah Hakadosh* to *Shavuot d'h Haftorah*.

meat meal during the day.⁴⁶ The most prevalent custom, today, for those wishing to eat meat at all Shavuot meals and to fulfill the custom of eating dairy in accordance with the *Zohar* is to partake of dairy delicacies with *Kiddush* after *davening* and only later in the day having a meat meal.⁴⁷

The laws of eating meat after dairy may appear to be confusing. It is often difficult to understand the development of halacha from the Gemara to the *Rishonim* and to the *Shulchan Aruch*. It is the intention of this article to clarify the source of the two rulings of the *Ramo* which are in direct conflict to the Gemara and *Shulchan Aruch*: (1) the necessity to wait a certain interval of time after eating dairy and before consuming meat, and (2) the requirement to wait six hours after eating hard cheese before eating meat.

Because of the wide range of conclusions among halachic authorities, differences in *minhagim*, and with the changing manufacturing process of cheese making, it is imperative to consult a competent *moreh hora'ah* before deciding how to apply these halachot which come up on a day-to-day basis.

46. See *Orchot Rabeinu* volume 2 page 89 that such was the practice of the Steipler gaon, Rav Yaakov Yisrael Kanievsky. The *Darchei Teshuva siman* 89/19 writes against this because one is required to eat meat during the night meal as well as the day meal.

47. *Darchei Teshuva siman* 89/19 suggests this and says that this was the practice of his ancestors for many generations.

Kol Sasson V'kol Simcha: Halachic Considerations of Loud Wedding Music

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The Scientific Underpinnings of Damage by Music

Contemporary society has witnessed an explosion in sound. While there are obviously many benefits to sound amplification, prolonged or even brief exposure to extremely loud sound can cause temporary or permanent hearing loss. It is estimated that of the 30 million people who have hearing loss in the United States, one third are derived from excessive exposure to noise.¹ Hearing loss from prolonged noise exposure demonstrates several characteristics including that loss is nearly always bilateral and symmetric, will not progress once exposure has ended, and maximum losses typically occur after 10-15 years of exposure. Notably, hearing loss through loud noise demonstrates significant individual variability.

1. Shulman *et al.* Acoustic Trauma and Noise-induced hearing Loss. In, The Ear: Comprehensive Otology, Rinaldo F. Canalis and Paul R. Lambert, eds. Lippincott Williams and Wilkins, 2000.

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Relevance to the Jewish Wedding Scene

Extremely loud sounds are ringing throughout our communities at Jewish weddings.² Of note, Israel now requires catering halls to install decibel meters to automatically register noise levels. If the level exceeds 85 decibels, electricity is automatically cut. Failure to comply with the new law results in the loss of an operating license. The Israeli Environmental Affairs Ministry recorded that prior to the law the average level of noise exceeded 100 decibels.³

With respect to halachic considerations, the problem of damaging noise can be separated into two categories. The first applies to the orchestra producing the potentially damaging noise, while the second applies to the audience attending the wedding, thereby subjecting themselves to the damaging music. All four areas of the *Shulchan Aruch* are relevant when discussing damaging noise at weddings.

Possible Prohibitions

Halacha considers the loss of hearing a type of damage.⁴ However, the permanent hearing damage that may be incurred at weddings is unique as it accumulates over extended time. Nevertheless, individuals are much more susceptible to temporary damage which is perceived as pain and short-term hearing loss or “cotton balls in the ears.” Resolving shortly after exposure, this type of pain and temporary damage occurs routinely today with amplified music at weddings. Furthermore, other manifestations of the acoustic strike, which may not be classified as actual damages,

2. Clearly, sounds at Jewish weddings are not the only sounds capable of producing noise induced hearing loss. However, the Jewish wedding sets the stage for an unique milieu of circumstances which will be discussed.

3. ArutzSheva news reported in November 2006.

4. *Kiddushin* 24b. *Bavli Bava Kama* 86a records Rabbah as commenting that one who “makes his father deaf is executed because it is impossible to deafen without a wound as a drop of blood fell in his ear.”

are apparent such as headaches or ringing in the ears. Therefore, three different categories can occur, including permanent damage, temporary damage, and pain.

Halachic Considerations of Damaging Oneself

The halachic difficulty of audiences listening to loud music is directly related to the problems of permissibility of damaging oneself.⁵ The talmudic source for this prohibition is *Bava Kama* 90-91, where a dispute about the permissibility of such damage is discussed.⁶ The Mishnah first presents R. Akiva as maintaining that even though one is forbidden from damaging oneself, one is exempt from penalties⁷ for doing so. However, the Gemara then presents a conflicting *Baraita* in which R. Akiva maintains that one does have permission to damage oneself. The Gemara quickly resolves this apparent contradiction explaining that the allowance R. Akiva gives to damaging oneself is referring only to humiliation and not to bodily injury.⁸ Most early commentators rule in accordance with the Mishnah that one does not have permission to damage oneself.⁹ Noteworthy, a minority view does state that

5. The lack of ownership of one's body may be at the teleological root of the prohibition. R. Shneur Zalman of Liadi in *Shulchan Aruch Harav, Hilchot Nezikei Guf U'nefesh* 4 writes that "man does not have ownership over his body at all to hit it, disgrace it or to cause it any pain even through refraining from eating or drinking." Interestingly, R. Shneur Zalman does allow for fasting in order to facilitate teshuva.

6. The Gemara *ibid.* cites possible Torah verses accounting for the prohibition to damage oneself. Additionally, Tosafot on *Shevuot* 36a suggest that either "only guard yourself. . ." or "and you shall guard your souls exceedingly. . ." may be sources for the prohibition of damaging oneself.

7. One would be exempt from both lashes and the fine one normally has to pay for bodily damage as defined in *Bava Kama* 83b, which include the damage, pain, medical treatment, loss of employment and embarrassment.

8. See Tosafot, who suggest the contradiction between the Mishnah and *Baraita* is the result of two different *tannaitic* renderings of R. Akiva's opinion.

9. Both *Rif*, *Bava Kama* 32a, and *Rosh*, *Bava Kama* 8:13, only cite the

one does have permission to damage oneself albeit in a limited sense. *Bava Kama* 91b records an incident in which R. Chisda chose to damage himself by walking among thorns and thistles rather than potentially damaging his clothing. R. Chisda reasoned that his body would heal while his clothes would not.¹⁰

All authorities would agree that self-directed damage is permitted in certain situations. *Pnei Yehoshua*¹¹ explains that the aforementioned debate about the permissibility of self-directed damage focuses on situations of little need. *Pnei*

Mishnah which states that one does not have permission to damage oneself but is nevertheless exempt. *Tosafot* on *Shevuot* 36a forbid damaging oneself. *Ri Migash* 186 writes that the Torah does not allow for one to pain oneself. *Rambam*, *Hilchot Chovel* 5:1 writes that it is forbidden to damage oneself and in *Hilchot Shevuot* 5:17 writes that one does not have permission to damage oneself. *Magid Mishnah* ibid. quotes the Mishnah saying that one does not have permission to damage oneself.

Tur also writes that one does not have permission to damage oneself, but follows this statement by recording the position of R. Meir Abulafia who in certain cases permits bodily damage. *Yam Shel Shlomo* 8:59 and *Perisha* 420:21 record *Tur* as ruling that damaging oneself is permitted. *Sdei Chemed* finds a difficulty with *Tur*'s inclusion of R. Abulafia's position as it was left out from *Rif*, *Rambam* and the *Tur*'s father the *Rosh*. Furthermore, *Tur* himself leaves out R. Abulafia's position in *Kitzur Piskei HaRosh*.

Shulchan Aruch's (420:31) position is clear in that he does not allow for bodily injury; however, like *Tur*, there are different versions of the *Shulchan Aruch*, both including and excluding the word "exempt." *Rashba* 1:616:31, *Yam Shel Shlomo*, *Bava Kama* 8:59, *Levush* ibid., *Sefer Chasidim* 676 (Mossad Harav Kook), *Radbaz* *Hilchot Shevuot* 5:17, *Smag* positive command #70 and negative command #241 and *Meiri*, *Bava Kama* 91b, write that one does not have permission to damage oneself. *Sefer Chasidim* ibid. writes that while exempt from human courts, one is still liable to the heavenly court.

10. *Shitah Mekubetzet*, ibid., cites R. Abulafia as allowing one to damage oneself in the context of R. Chisda's actions. *Tur* also cites the R. Abulafia's permissive ruling. Furthermore, according to *Yam Shel Shlomo*, *Tur* holds like R. Abulafia. *Bach* ibid. is in agreement with R. Abulafia's position. However, according to *Yam Shel Shlomo* ibid., R. Abulafia's position requires that the bodily damage be done for a purpose, and argues that everybody, including R. Abulafia, would agree that bodily damage with no purpose is prohibited.

11. *Pnei Yehoshua*, *Bava Kama* 91b.

Yehoshua contends that for great need and life-saving circumstances one would, in fact, be permitted, or even obligated to damage oneself.¹² Despite these allowances, Rashba¹³ forbids damaging oneself for benefit. Presumably, damage for life-saving need is clearly permitted while gratuitous damage is clearly forbidden. A range of opinions concerning more nuanced instances of self-directed damage is further elucidated by later authorities.

Plastic surgery is an issue which these later authorities have dealt with extensively further defining the purview of permissible, self-directed damage. While several other important issues regarding plastic surgery are also manifest, self-directed damage is clearly a prominent concern. R. Eliezer Waldenberg¹⁴ argues that plastic surgery constitutes bodily damage which is prohibited other than for medical treatment. However, R. Moshe Feinstein¹⁵ argues for the permissibility of plastic surgery as it is neither “*derekh nitzayon*” (contentious manner) or “*derekh bizayon*” (embarrassing manner) but rather desired by the patient as a physical improvement.¹⁶ R.

12. As cited above, the *Sdei Chemed* does not believe that damage done for a purpose is even called bodily damage.

13. *Bava Kama* 91b.

14. *Tzitz Eliezer* 11:41.

15. *Iggerot Moshe, Choshen Mishpat* 2:66.

16. Unfortunately, conflicting renderings of Rambam’s text contribute to confusion. Rambam (*Mishneh Torah, Chovel U’Mazik* 5:1) states, “It is forbidden for one to damage oneself or someone else. And not only the damager, but all who hit a ‘*kasher*’ person from Israel, whether a minor or adult or man or woman, in a *derekh nitzayon/bizayon* violate a negative commandment.” One textual variant reads “*derekh nitzayon*” while another variant reads “*derekh bizayon*.” Significantly, the Shabtai Frankel edition of *Mishneh Torah* does not include *derekh bizayon* in its compendium of different textual variants. Maharalbach, *Kuntres Hasemicha*, records Rambam as writing *derekh nitzayon*. Notably, *Smag*, positive commandment 70, records the prohibition as *derekh bizayon*. R. Joseph B. Soloveitchik in *Mesorah* 2:52 cites as a source for *derekh bizayon* the verse from *Devarim* 25:3 which reads “forty [lashes] shall he strike him, he shall not add; lest he strike an addition blow beyond these your brother will be degraded in your eyes.” R.

Feinstein's view of acceptable bodily damage seems to be that bodily damage is restricted to situations of significant need.¹⁷

Paining Oneself

One is prohibited from hitting another person causing pain even without causing any damage.¹⁸ A range of opinions is discussed as to whether there is a similar prohibition of unwarranted paining oneself. Maharalbach¹⁹ writes that one

Soloveitchik cites for the source of *derekh nitzayon* the verse from *Shemot* 21:22 which reads "If men shall fight and they collide with a pregnant woman and she miscarries, but there will be no fatality. . . ."

R. Soloveitchik raises two difficulties with this text based on talmudic sources. First, he points to *Sanhedrin* 84b in which neither *derekh nitzayon* or *derekh bizayon* seem applicable, as the damage was of medical necessity and yet there was still concern about violating a prohibition. He also argues that *derekh nitzayon* presents a difficulty as one could not damage oneself in a contentious manner. Noting that one would be able to damage oneself in an embarrassing manner, R. Soloveitchik contends that *derekh bizayon* does not present the same difficulty.

R. Yerucham Perlow in his commentary to R. Sadia Gaon's *Sefer Hamitzvot*, negative prohibition 47/48, makes a similar observation. R. Perlow writes according to Rambam the only types of hitting which are excluded by the *derekh nitzayon/bizayon* clause are medical treatment and a father/teacher disciplining their son/student. Any other forms of hitting or damage would be classified as *derekh nitzayon/bizayon* and therefore forbidden.

17. For those authorities who hold that one does not have permission to damage oneself, there is still discussion as to what level prohibition would be violated. According to Rashba, *Responsa* 1:616:31 and *Behag* (beginning of *Hilchot Shevua*), the prohibition is a Torah level violation. The *Sdei Chemed*, *Ma'arechet Ha-alef* 40, explains that he believes that *Sefer Chasidim* also held that damaging oneself is a Torah level violation. However, according to *Beit Yosef* if one were to take an oath to harm oneself, one would have to fulfill the oath. Meiri, *Bava Kama* 91b also holds that the oath is binding. *Chelkat Yaakov*, *Choshen Mishpat* 31, explains that according to Ran the prohibition is a more severe violation than Meiri.

18. Rambam, *Hilchot Chovel U'mazik* 5:1 includes both damaging and hitting without causing damage in the same halacha. See also *Tur*, *Choshen Mishpat* 420 and *Shulchan Aruch*, *Choshen Mishpat* 420:41.

19. *Kuntres Hasemicha*. While Maharalbach concedes that his position is not clear from Rambam in *Hilchot Chovel U'mazik*, he maintains that it is implied

can allow another to pain oneself if given permission, but never allow another to damage oneself. This distinction seems to be in contrast to that of Ri Megash's²⁰ formulation in which one does not have permission even to pain oneself.

Misameach Chatan V'Kallah – To gladden the Bride-groom and Bride

Accordingly, gratuitous, self-directed damage, and according to some authorities, self-directed pain are forbidden according to halacha. Because the extremely loud music occurs in the context of a wedding with the mitzvah to gladden the bride and bridegroom, this damage possibly might not be considered gratuitous. Furthermore, the halachic imperative to gladden the bride and bridegroom may constitute a great enough need to suspend the prohibition of damaging oneself. Halacha has defined the parameters of gladdening the bridegroom and bride; germane to the current discussion, the importance of this commandment has necessitated allowances to facilitate its fulfillment. Rambam, *Hilchot Avel* 14:1 writes:

The following positive commands were ordained by the Rabbis: visiting the sick; comforting mourners; joining a funeral procession; dowering a bride; escorting departing guests; performing for the dead the last tender offices; acting as a pallbearer; going before the bier; making lamentation; digging a grave and burying the body; causing the bride and bridegroom to gladden; providing

by Rambam's use of "derech nitzayon" or "contentious way" when referring to damaging or hitting another. If the two parties consent to the strike, then it cannot be considered contentious. According to Maharalbach, this logic does not work if damage is incurred. Similarly, *Darchei David* believes there is a difference between hitting oneself without causing damage and causing bodily damage to oneself. He learns this because Rambam writes not to damage oneself and others and then later writes not to hit others, without including oneself. *Iggerot Moshe, Chosen Mishpat* 2:66 does not support this understanding.

20. See Footnote 18.

them with all their needs. These constitute deeds of loving-kindness performed in person for which no fixed measure is prescribed. Although all these commands are only on rabbinical authority, they are implied in the precept: "And you should love your neighbor as yourself" [Vayikra 19:18], that is: what you would have others do unto you, do unto him who is your brother in the Law and in the performance of the commandments.

From this excerpt, it is clear that these commandments, including those pertaining to the wedding, are positive rabbinic commands; however, the Rambam includes them under the greater Torah-level rubric to love one's neighbor as oneself. *Shulchan Aruch Even Haezer* 65:1 codifies the mitzvah to gladden the bridegroom and bride.²¹ *Tur* and *Beit Yosef* both write that whoever benefits from the wedding meal and does not gladden violates the "five sounds" that accompanied the Torah when it was given, based on *Berachot* 6b:

Rebbi Chelbo said in the name of R. Huna: "Anyone who benefits from the banquet of a bridegroom and does not gladden him violates the five sounds, as it is stated, 'The sound of joy and the sound of gladness, the sound of the groom and the sound of the bride, the sound of people saying, Praise Hashem, [Master] of legions.' And if he does gladden what is his reward? Rebbi Yehoshua ben Levi said, 'He merits the Torah which was given with five sounds, as it is stated: 'On the third day when it was morning, there were sounds and lightening, and a heavy cloud on the mountain, and the sound of the shofar, etc. ...and God would respond to him with a sound.' " Rebbi Abahu said, "It is as if he brought a *todah* offering for it is stated 'they bring *todah* offerings to the Temple of Hashem.' " R. Nachman bar Yitzchak said, "It as if he built up one of the ruins of Jerusalem for it is stated, 'For I will

21. See *Tur*, *Beit Yosef*, *Aruch Hashulchan*, *ibid.*, who write that this is a "mitzvah gedolah" or great mitzvah.

return the captivity of the land as at first, said *Hashem*!"²²

One can fulfill the commandment through a variety of ways. One fundamental way is through the spoken word, gladdening the bridegroom.²³ A source emphasizing the importance of the spoken word is *Ketubot* 16b which records, "The Rabbis taught in a *Baraita*: 'How do we dance before the bride?'" Rashi understands this to mean, "What do we say before her?"²⁴ Because the words are spoken while dancing, this implies that dancing and the spoken word are two separate aspects of rejoicing the bridegroom and bride.^{25,26} Along these lines, the *Shulchan Aruch*, *Even HaEzer* 65:1 includes dancing when discussing this mitzvah.²⁷

In addition to dancing and particularly relevant to this discussion, many halachic authorities consider music an integral part of the mitzvah to gladden the bride and bridegroom.²⁸ Many *Rishonim* believe that there is no *simcha*

22. See the *Perisha* 65:2 where he writes that one who did not benefit from the wedding did not violate any commandment. However, *Nisuin K'Hilchatan* records that *Tiv Kiddushin* writes that even *Perisha* would agree that one would still fulfill the commandment even if they did not benefit from the wedding.

23. *Berachot* 6b and Rashi.

24. See *Be'er Sheva* Responsum #50 who says that the mitzvah is with words, specifically saying that the bride is beautiful and charming. Also see *Taz* in 65:1, that some believe that the mitzvah cannot be fulfilled through dancing but only through the spoken word.

25. This is the implication of *Shitah Mekubetzet* and *Maharsha*.

26. Rashi on the verse from *Kohelet* 3:4 "time to dance" explains that this refers to bridegrooms and brides.

27. *Nisuin K'Hilchatan* writes that *Derech Pikudechah* explains that there is a kabbalistic reason behind dancing.

28. See *Maharil*, *Hilchot Eruvei Chatzerot* 7, for a story that a ruler died and in his honor the government ruled no one could play a musical instrument for one year. *Mahari Segal* was asked if it would be possible to have the wedding without music. He responded that one should not have the wedding without a musical instrument because it is the main part of the *simcha* for the bridegroom and bride. *Maharil* concludes that if it is not possible to play music in one location, then one should go somewhere where

for the bridegroom and bride without a musical instrument.²⁹ Thus, the importance of music at weddings leads to interesting halachic allowances. After the destruction of the Second Temple, our Torah sages forbade listening to music; however, at weddings it is permissible to play music because of the mitzvah to gladden the bridegroom and bride.³⁰ Additionally, one would be permitted to tell a non-Jew to play music on Shabbat at a wedding for the purpose of gladdening the bridegroom and bride.³¹

Making Sacrifices to Gladden the Bridegroom and Bride

The commandment to gladden the bridegroom and bride is so significant that even those whose learning is their profession would be required to leave their learning to gladden the bridegroom and bride.³² Furthermore, the Gemara³³ emphasizes that a Torah scholar would be able to reduce his honor in order to gladden a bridegroom and bride:

They said about R. Yehuda bar Il'ai that he would take a branch of myrtle and dance before the bride, saying, "A

it would be possible. Also see *Iggerot Moshe, Yoreh Deah* 2:112 where he writes that in places where music is played at weddings there is an obligation to do so, just like having the wedding meal itself.

29. See Ravyah, *Hilchot Yom Tov* 796, Maharil, *Hilchot Eruvei Chatzerot* 7, *Mordechai* 696, *Tur* ibid. citing the *Avi Haezri*.

30. See *Tosafot, Gittin* 7b, *Ramo, Orach Chaim* 560:3; in Jerusalem, the *minhag* is still to refrain from playing music with instruments.

31. *Shulchan Aruch, Orach Chaim* 338:2 and *Mishnah Berurah* ibid. explain that the prohibition against producing noise with a musical instrument on Shabbat is rabbinical. The prohibition against telling a non-Jew to do something prohibited is also rabbinical. *Levush* maintains that instructing a non-Jew would be prohibited except for the purpose of rejoicing the bridegroom and bride. *Magen Avraham* ibid. cites Radbaz who says that in his land one would not ask a non-Jew to play music on Shabbat for a wedding, but would not stop a non-Jew if he started on his own initiative.

32. See *Chelkat Mechokek* 65:2 and *Beit Shmuel* 65:1.

33. *Ketubot* 17a.

beautiful and charming bride." R. Shmuel bar R. Yitzchak would dance, [juggling] three [myrtle branches]. R. Zeira said, "The elder is embarrassing us."

Considering the importance of *kevod habriyot* (human dignity) in halacha, the actions of R. Shmuel are significant.³⁴ While *Bava Kama* 91b states that one does have permission to humiliate oneself, R. Moshe Feinstein³⁵ relates that more serious acts of self-humiliation are forbidden. Furthermore, halacha gives Torah scholars' dignity additional consideration.³⁶ Rashi comments that R. Shmuel's actions according to R. Zeira's were disrespectful to all Torah scholars, including R. Shmuel's own honor, which is why R. Zeira did not approve of his behavior. Nevertheless, R. Shmuel was rewarded for his actions, as the Gemara relates:

When [R. Shmuel bar R. Yitzchak] passed away, a pillar of fire separated him from everyone else, and we have a tradition that a pillar of fire separates only one or two in a generation. R. Zeira said, "The elder's branch helped him." And some say the elder's foolishness. And some say the elder's opinion.

34. See R. Daniel Feldman's *The Right and the Good*, chapter "Created in his image: Concerns for human dignity." R. Feldman discusses the concessions halacha makes to preserve human dignity some of which include the suspension of rabbinic law, passive biblical law, and monetary law.

35. *Iggerot Moshe*, *Yoreh Deah* 1:249; R. Moshe cites *Shulchan Aruch*, *Choshen Mishpat* 34:18 which states, "The disgraced are disqualified from being witnesses." R. Moshe holds that taking part in such self-deprecating activity, which would disqualify one from being a witness, is forbidden.

36. *Kiddushin* 32 discusses the permissibility of Torah scholars forgiving honor which is an affront to their dignity. This debate is predicated on whether the honor due to a Torah scholar is for the Torah itself, which cannot be renounced, or for the effort involved in acquiring the Torah, which can be renounced. See *Iggerot Moshe*, *Orach Chaim* 2:34 s.v. *tzarich lomar*. *Shulchan Aruch*, *Yoreh Deah* 244:14 rules that Torah scholars are allowed to renounce honor due them. Nevertheless, Rivash, responsum #220, writes that while Torah scholars can renounce honor due them, they cannot forgive being embarrassed.

Tosafot, Rashba and Ritva all write that this honor was known to have resulted from R. Shmuel's wedding practice because the fire was in the shape of a myrtle.^{37,38}

In addition to forgoing one's honor at a wedding, the Tosafot on *Succah* 45a write that one can also forgo material damage sustained while gladdening the bridegroom and bride. The Gemara there identifies a peculiar custom where the adults would steal the children's *lulavim* and eat their *etrogim* at the end of Succot in the *Beit Hamikdash*.³⁹ Tosafot relate a similar practice:

Those young men who ride on horses to greet the bridegroom and joust and tear their friend's clothes or damage their horse, are exempt from paying damages, because this is what they are accustomed to do on account of the *simcha*.

While jousting is a seemingly unconventional way to gladden, the practice appears to have been accepted in earlier times. Clearly, this dangerous activity comes at risk; however, Tosafot write that this risk to material damage is negated by the commandment to gladden the bridegroom. Ramo⁴⁰ codifies this but notes that the local *Beit Din* reserves the right to stop the practice.

Sacrificing One's Body for Mitzvot

Although one would be able to sacrifice one's learning of

37. *Yershalmi Peah* 7b and *Bereshit Rabbah* 59:4 relate the events' details differently, but both support the notion that the honor due to him was a result from his wedding practice.

38. *Chavot Yair*, Responsum #205, allows a Torah scholar to play a musical instrument despite the apparent embarrassment. *Pitchei Teshuva, Yoreh Deah* 244:4 cites this ruling.

39. Rashi and Tosafot write that this was not considered theft because this was considered an acceptable expression of joy.

40. *Choshen Mishpat* 378:9.

Torah, dignity and material possessions for the mitzvah of gladdening bride and groom, the question remains if one would be able to sacrifice one's health to that end. Other situations in halacha do allow and even encourage one to make sacrifices for positive commandments. For example, even if one hates wine or finds it damaging, the *Shulchan Aruch*⁴¹ maintains that one must force oneself to drink four cups of wine on Pesach. However, the *Mishnah Berurah*⁴² writes that this refers only to one who experiences headaches but not to suffering which would confine him to bed. Furthermore, the *Shaar HaTzyion*⁴³ comments that one who suffers to such an extent from drinking at the Seder would contradict the purpose of the commandment, which is to show "derech cherut," a manner "showing our freedom from slavery." *Nishmat Avraham*⁴⁴ notes that according to R. Neuwirth if it were not for the drinking being "derech cherut," one would be required to drink the wine. Accordingly, the prohibition of damaging oneself is seemingly not what is preventing one from drinking damaging amounts, but rather the concern for "derech cherut."

The conflict generated by mitzvah observance which leads to bodily harm also arises with regard to the mitzvah of succah. R. Karo⁴⁵ writes that patients and their caregivers are exempt from sitting in the succah. Extending the exemption's purview, he not only includes a seriously ill patient, but even

41. *Shulchan Aruch, Orach Chaim* 472:10. Rashba responsum #238 records similarly. The Talmud relates that in fact this is how our Torah sages conducted themselves. *Nedarim* 49b relates R. Yehudah said, "I taste [wine] only to make *Kiddush, Havdalah* and to drink the Four Cups on Pesach. Furthermore, [after drinking], I must bind my temples [to alleviate the headache] from Pesach until Shavout." For textual variants see *Yerushalmi Shekalim* 3:47, *Yerushalmi Shabbat* 8:11 and *Yerushalmi Pesachim* 10:37.

42. 472:35.

43. 472:52.

44. *Nishmat Avraham, Choshen Mishpat* 420:31:3.

45. *Shulchan Aruch, Orach Chaim* 640:3; based on *Succah* 26a.

someone with “discomfort in his head or eyes.” Thus one is exempt from the mitzvah of succah at a less stringent threshold than for the mitzvah of the four cups. *Mishnah Berurah*⁴⁶ explains that the reason for the exemption is because one must live in the succah as one normally lives at home. Furthermore, *Shulchan Aruch* continues that one who is not sick but experiences discomfort on account of the succah is exempt.⁴⁷ *Mishnah Berurah*⁴⁸ reiterates that one must live in the succah like one dwells the rest of the year. Therefore, the reason for this exemption seems to be limited to succah.

However, *Kaf HaChaim*,⁴⁹ citing *Levush*, implies that the exemption may apply to other mitzvot as well, reasoning that we were given the Torah to live by it and not to die by it. With respect to other positive commandments, a range of opinion exists as to how far one must sacrifice. *Birkei Yosef*⁵⁰ records the low threshold position of the *Rosh Yosef*, holding that one who is in pain is exempt from all positive commandments. At a higher threshold, *Chelkat Yoav*⁵¹ postulates that it is better for a *choleh she'ain bo sakana* (moderately sick person) to miss the opportunity to perform a positive commandment than to actively damage himself.

*Ramo*⁵² comments that one is required to spend up to a fifth of one's assets in order to fulfill positive commandments. *Shach*⁵³ writes that further study is required to determine if this

46. *Mishnah Berurah* 640:3:6.

47. *Shulchan Aruch* identifies sources of discomfort including wind or flies which prevent sleep or a bad smell. Of note, *Ramo* adds that on the first night he is still obligated to eat a *kezayit* in the succah despite discomfort.

48. *Mishnah Berurah* 640:4:13.

49. *Orach Chaim* 640:15.

50. See *Birkei Yosef*, *Orach Chaim* 38:6 and *Orach Chaim* 472:10. The *Birkei Yosef* does not subscribe to this position himself.

51. *Dinei Oneis* 7.

52. *Shulchan Aruch*, *Orach Chaim* 656.

53. *Yoreh Deah* 157:3.

principle also operates with respect to danger to one's limbs. Concluding that one should be lenient, *Shach* does not seem to be willing to sacrifice limbs for positive commandments. *Binyan Shlomo*⁵⁴ applies the one-fifth principle with respect to pain, noting that being exempt from mitzvot is contingent on one's subjective sensitivity to damage. For example, *Binyan Shlomo* writes that if a sick person feels that by eating matzoh or *maror* or going to the succah he will be damaged, then he is not permitted to do so. Moreover, if a doctor asserts that damage is possible from such activities, one would not be permitted to be stringent in performing the mitzvah. R. Eliezer Waldenburg⁵⁵ agrees with this reasoning.⁵⁶

Metaphysical Protection

As discussed above, one may be compelled to perform mitzvot in spite of possible personal harm. This mandate to perform mitzvot may be related to the metaphysical protection that mitzvot afford. The Gemara⁵⁷ records R. Elazar as commenting, *shluchei mitzvah aynan nizakin*, those sent to perform a mitzvah are not harmed. R. Elazar makes this comment in the context of searching for *chametz* in dangerous locations. R. Ashi explains that perhaps the searcher lost a needle before the search. Rashi elaborates that the searcher may also be looking for the needle in addition to the *chametz*, and may be susceptible to damage since he is not involved in mitzvah activity exclusively. Therefore, in order to receive protection under the *shluchei mitzvah aynan nizakin* principle, one must be dedicated to the mitzvah exclusively.⁵⁸ Moreover,

54. *Binyan Shlomo*, *Orach Chaim* 47.

55. *Tzitz Eliezer* 12:43.

56. R. Sternbuch comments that one should be lenient when it comes to sacrificing limbs for positive commandments. *Halacha U'Refuah* 4:147.

57. See *Pesachim* 8a-b.

58. The Gemara quickly rejects this idea, responding with a *Baraita* which states that one who gave *tzedakah* so that his son should live or to merit the

the Gemara further limits the principle, stating that when harm is likely, it does not apply.⁵⁹

Nevertheless, the Torah may grant more protection than afforded by the *shluchei mitzva aynan nizukin* principle. *Sotah* 21a states that R. Menachem Bar Yose expounded the verse that a mitzvah is a lamp and the Torah is light to mean that just as a lamp (limited fuel) protects from danger only temporarily, so the mitzvah protects only temporarily. In contrast, light protects continuously, so the Torah protects forever.^{60,61} Moreover, the metaphysical protection attained through merit may be extended from one who is deserving to others who may not be deserving.⁶² Additional protection may be afforded according to the verse from *Tehillim* 115:9, "*shomer petaim Hashem* –*Hashem* protects the simple."⁶³

world to come is still considered completely righteous. Therefore, even though one is performing the mitzvah for ulterior motives, this does not detract from the mitzvah. See the *Yad Hamelech, Hilchot Teshuva* 10:4 which states that there is a difference between giving *tzedakah* which can be performed on condition of receiving reward *l'chatchilla* and other mitzvot which must not be performed in order receive reward. R. Soloveitchik explained that *tzedakah* is the only mitzvah in which one's ulterior motives are irrelevant to the mitzvah performance. The only significant fact is whether the intended recipient receives the *tzedakah*. (Personal reflection from *shiur*.)

A fascinating illustration of the consequences of failure of a mitzvot to provide protection when not done as intended is recorded by *Nishmat Avraham, Even Ha'Ezer* 2:7:2.

59. The Gemara *ibid.* cites an episode in which the prophet Shmuel was told by *Hashem* to anoint King David. However, Shmuel was reluctant to do so because he feared King Shaul would kill him. Therefore, when danger is probable, one cannot rely on the *shluchei mitzvah aynan nizakin* principle. *Kiddushin* 39b reiterates this point with an example of one who died climbing a rickety ladder while performing the mitzvah of *shiluach haken*. The Gemara *ibid.* states that we do not rely on miracles.

60. See R. Hirsch in his commentary to *Bereshit* 18:18.

61. *Mishnah Berurah* 494:1 cites R. Isaac Luria as stating that all who stay up and learn Torah Shavout night will not be damaged the coming year.

62. See *Taanit* 20b.

63. For further analysis of the parameters of *shomer petaim Hashem*, see the

Despite these possible metaphysical protections, our sages are reluctant to rely on the merit of Torah to save from harm. The text in *Taanit* continues to cite R. Yannai who stated that one should never stand in a dangerous place and say, “a miracle will be performed for me,” because perhaps the miracle will not be performed. Moreover, if the miracle is performed, it detracts from one’s merits.

Possible Prohibitions Related to Playing Loud Music

Any prohibition relating to the orchestra is directly connected to the prohibition of damaging another.⁶⁴ Relevant

article by DiPoce James and Buchbinder SS, *The Journal of Halacha and Contemporary Society* 2001 Fall;(42):70-101.

64. Several Torah verses have been identified as the source for the prohibition of damaging another. One possible source is “*lo yosif*” from *Devarim* 25:3 which states “forty [lashes] shall he strike him, he shall not add; lest he strike an additional blow beyond these.” While the phrase *lo yosif* is describing additional, unwarranted punishment dealt by the court’s agent, the prohibition applies to those not liable to punishment as well. *Sanhedrin* 85a infers that if the prohibition to giving unwarranted punishment applies to sinners, then it would surely apply to the righteous who do not deserve punishment. Rambam, *Hilchot Chovel U’Mazik* 5:1 holds that this is the source for the prohibition of damaging another.

Sefer HaChinuch (Mitzvah 243) maintains that when violating the negative precept of damaging another, one also violates the positive precept of “*veahavta lerei’acha kamocha*” – “loving your neighbor as yourself.” R. Abulafia in *Yad Ramah, Bava Batra* 2:107 suggests that “*veahavta lerei’acha kamocha*” is the source for the prohibition of damaging others. R. Kook in *Orach Mishpat* states that one would be in violation of loving another as oneself even if the damage is *hezek sh’aino nikar* – not perceptible damage. See *Sanhedrin* 84b and Rashi *ibid.* who explains a general rule that one is admonished only from doing to others what one would not want done to oneself. If the orchestra members are wearing ear plugs, then it seems that they would have a difficult time fulfilling this positive commandment.

R. Abulafia also suggests “*lifnei iver lo titen michshol*” – “do not place a stumbling block before the blind” as a source for the prohibition of damaging. *Chatam Sofer, Yoreh Deah* 241 postulates that causing damage violates the commandment of “*lo taamod al dam rei’acha*” – “do not stand on the blood of your friend.” *Chatam Sofer* also writes that causing damage violates the commandment “*venishmartem me’od lenafshoteichem*” – “and you

to this discussion, the Gemara identifies situations in which one damages another through sound. As stated above, the Gemara⁶⁵ considers the loss of hearing a type of damage. In other locations, the Gemara⁶⁶ specifically discusses the parameters concerning sound as a vehicle for damage. Citing a *Baraita*, the Gemara states that if one struck his slave on the ear with a deafening blow, the slave goes free. However, if one struck opposite the ear⁶⁷ and deafened the slave, the slave does not go free.⁶⁸ Similarly, if one shouted into another's ear and deafened him, the shouter is exempt from the earthly court.⁶⁹ However, if one shouted into another's ear while grabbing them, the shouter is liable.⁷⁰ Therefore, serious halachic

shall protect your souls exceedingly."

65. *Bava Kama* 86a. As a testament to the importance in halacha of damaging another's hearing, one must pay the person's total value for having made them deaf. This total payment is in contrast to other injuries which are judged by themselves. See *Bava Kama* 85b, *Rashi*, *Rashba*, *Meiri* *ibid.*, and *Shulchan Aruch Choshen Mishpat* 420:25.

66. *Bava Kama* 91a and *Kiddushin* 24b.

67. *Rashi*, commenting on *Kiddushin* *ibid.*, and *Shitah Mekubezet*, citing *Gaon* in *Bava Kama* *ibid.*, explain that this means that the slave's ear was on one side of a wall and the opposite side was struck.

68. Significantly, the context of these texts suggests that the mechanism of deafness is through extreme frightening of the damaged party and not through the intrinsic damaging capability of sound. Nevertheless, the Gemara understands that sound is capable of causing damage for which one is liable. Perceptive to the differential consequences of damage done to material and damage done to the animate, the Gemara summarizes with *R. Ashi*'s insight that "a person is different [from material] since [a person] is an intelligent being, he sends himself into shock." *Rashi* explains that the person only experiences hearing loss because his heart focused on the petrifying sound. Similarly, *Yam Shel Shlomo* (*Bava Kama* 91a) understands that the damage inflicted is through terrifying the damaged party. Furthermore, *Yam Shel Shlomo* understands that the damage is through *grama*, as the damager is not doing an action with his hands. Likewise, *Ritva* (*Kiddushin* 24b) explains that this damage is actually through *grama* (causation), and therefore, one would be exempt from the earthly court.

69. Because the damage is through *grama*, one would presumably still be liable in the heavenly court.

70. Both *Rambam* in *Hilchot Chovel U'Mazik* 2:7 and 2:12 and *Shulchan*

considerations emerge where an orchestra could be liable for causing permanent hearing damage.

Gramा/garmi– Indirect Damage

As mentioned above, the potential permanent damage that might occur at weddings would be the result of continual exposure to loud noise even though no direct physical contact takes place. Halacha considers damages that are direct and unquestionably caused by certain sources separately from other types of indirect damages. These indirect damages can be further divided into groupings referred to as *grama* and *garmi*. The differences between these terms is subject to significant debate among the halachic authorities.⁷¹ Damage incurred through *garmi* is subject to a *Tannaitic* debate about liability. This argument continues into the *Rishonim*. There are many commentators who are of the opinion that certain damages are exempt from the earthly court but nevertheless would be liable in the heavenly court since the individuals bear the responsibility for their actions.⁷²

Nonetheless, even if little or no damage is incurred, *Chazal*⁷³ established that one who is “*tokeah l’chavero*” must pay a penalty of a *sela*. The definition of *tokeah l’chavero* is subject to discussion. Rashi defines it as meaning either to strike another’s ears or to shout into another’s ears. Rambam in his *Commentary to the Mishnah* understands *tokeah l’chavero* to mean striking another with a fist.⁷⁴ Either interpretation entails

Aruch Chosen Mishpat 420:32 and 420:25 record this as the halacha.

71. See *Encyclopedia Talmudit* for a summary of the positions of *grama/garmi*. Rashi, *Bava Batra* 22b, cites the opinion that there is no difference between *grama* and *garmi*.

72. See *Rishonim to Bava Kama* 55b.

73. *Bava Kama* 90a, 36b.

74. Rambam to *Hilchot Chovel U’mazik* 3:9 seems to be in accordance with this understanding. *Hagahot Maimoniot* ibid. notes that this is in accordance with Rosh. R. Ovadiah Bertinoro in his commentary to the *Mishnah*

little damage to the victim as supported by the early commentators' interpretation of what this *sela* penalty represents. Rashi, Ra'avan and Meiri in their commentaries to *Bava Kama* 90a comment that the payment must be for embarrassment. Meiri 36b also suggests that pain may be included in the payment. Interestingly, Meiri 90a notes that for this *sela* penalty physical contact with the victim is not necessary.

This penalty instituted by *Chazal* may be relevant to the wedding scenario where orchestra-inflicted noise does not always cause permanent damage. Also, intent of the orchestra may be a limiting factor of this penalty as they neither intend to embarrass or pain the audience, and the audience is not likely to be embarrassed by such loud noise.

Modifying Circumstances

Culpability is often contingent on the victim's ability to pardon an offense. Intent of the assailant is clearly connected to the ability of the victim to pardon. An assailant who did not intend damage is more likely to be pardoned by the victim; this is relevant to the current situation where the orchestra is not acting with malice. In this vein, with respect to Purim celebrations, Ramo⁷⁵ writes that some say that if one damages another on account of revelry, the damager is exempt from the monetary penalties.⁷⁶

comments that this means striking another on the back of the neck. However, *Hagahot Maimoniot* also notes that the *Aruch* holds the alternative view which is that *tokeah l'chavero* refers to loud sound. Rashba to *Bava Kama* 36b cites *Rabbeinu Chananel* that this refers to shouting into another's ear. In addition to this interpretation, Meiri on *Bava Kama* 36b suggests that this also refers to blowing a horn into another's ear. *Beit Yosef* to *Choshen Mishpat* 420 cites *Nimukei Yosef* that *tokeah l'chavero* refers to loud sound.

75. *Shulchan Aruch, Orach Chaim* 695:2.

76. *Mishnah Berurah* qualifies the statement of Ramo, stating that the damager is not exempt from monetary penalty if the damage was not done on account of the *simcha*. Nevertheless, Ramo's leniency does not remove the prohibition of damaging somebody else, and the activity would still be

However, *Magen Avraham* ibid. cites *Knesset Hagedolah* who states that it is only referring to monetary damage and not to bodily damage. *Mishnah Berurah* ibid. cites *Bach* that the custom is not to exempt serious damages. Therefore, *Mishnah Berurah* and *Magen Avraham* both write that if an assailant intended to damage another during revelry, then the assailant would not be exempt. Because the orchestra likely does not intend to damage, this concern does not seem significant.

In a different context, *Rosh*⁷⁷ writes that a wrestler who blinds another wrestler in competition is exempt from the five penalties. *Rosh* explains that harm is inevitable and the amount of damage cannot be controlled, which independently provides an exemption. Furthermore, *Rosh* adds that it is impossible to wrestle peacefully such that neither party sustains injury. *Tur*⁷⁸ explains that both parties are accordingly forgiving of each other. *Beit Yosef*⁷⁹ clarifies that perhaps the exemption is contingent on both parties forgiving each other. If only one party is in a position to forgive as victim, then *Beit Yosef* explains exemption is not possible. This concern seems relevant to the wedding scenario as only the audience is in a position to forgive.

Many authorities rule that one does not have permission to request an assailant to damage him.⁸⁰ *Rambam*⁸¹ comments

proscribed.

77. *Responsum* 101:6.

78. *Tur* 421.

79. *Beit Yosef* 421:5. *Aruch HaShulchan* 421:3 also seems to support this conclusion.

80. *Bava Kama* 92a; the *Mishnah* states, “[If] one says [to another] ‘Blind my eye,’ ‘Cut off my hand,’ ‘Break my leg,’ [and the other agrees to do so, then the assailant] is liable [even if the inquirer added] ‘on the condition that there will be no liability’ [then the assailant is still] liable.” Commentators grapple as to why one would make such a request. *Rashba* ibid. suggests that the request was in distress or anger. *Tiferet Yisrael* ibid. suggests that the request was not serious.

81. *Mishneh Torah*, *Chovel U’mazik* 5:11; *Or Zarua* in *Piskei Bava Kama* 380

that an assailant who causes permanent bodily damage is liable for all five categories of payment because nobody really wants to be injured in spite of the request. However, *Tur*⁸² explains in the name of the Rosh that if the requester explicitly specifies an exemption, then the assailant would in fact be exempt from penalty. Significantly, *Rivash*⁸³ maintains that these exemptions from causing pain and bodily damage are monetary waivers; nevertheless, the assailant is still prohibited from causing pain and bodily damage. R. Feinstein⁸⁴ notes that one would be forbidden from damaging oneself, so surely one would be forbidden from asking another to do the same. According to R. Feinstein, the monetary penalty also cannot be waived. However, R. Feinstein notes that the assailant would be exempt from penalty and not be in violation of the prohibition of forty lashes if the resulting damage was exceedingly small⁸⁵ and not *derekh nitzayon* or *derekh bizayon*. *Minchat Chinuch*⁸⁶ notes that if the assailant was granted permission before hitting or even damaging, he would be exempt from penalty. Moreover, the assailant would not have transgressed any prohibition.

Emerging from this discussion is a variety of approaches with respect to the requestor of damage. Some authorities are clear that there are two separate issues which include the

cites *Sefer Chofetz* that one cannot forgive damage to one's extremities under any circumstance. *Shulchan Aruch Choshen Mishpat* 421:12 is in accordance with Rambam.

82. *Choshen Mishpat* 421; *Ramo Choshen Mishpat* 421:12 is in accordance with this view.

83. *Teshuvot HaRivash* 484; *Rivash* cites the prohibition's source from *Devarim* 25:3 which states "forty [lashes] shall he strike him, he shall not add." This also seems to be the position of the *Shulchan Aruch Harav, Hilchot Nezikei Guf Vanefesh* 4.

84. *Iggerot Moshe Orach Chaim* 3:78.

85. R. Feinstein notes that the damage must be less than a *prutah*.

86. *Mitzvah* 48; *Minchat Chinuch* also includes that even a mother and father could grant permission for hitting and damage, but this could include additional prohibitions.

inherent prohibition and the independent monetary considerations. Whether either or both of these issues apply to the assailant or the requestor of damage is subject to discussion among the authorities.

Summary and Recommendations

The music at our weddings is approaching dangerous levels which may cause pain, temporary damage, and potentially permanent damage. The halachic considerations can be broken into two groups – issues which apply to the audience and issues which apply to the orchestra.

Because one is forbidden from wantonly giving oneself pain or damaging oneself, one might be forbidden from attending weddings where this is an expected consequence. However, attending weddings is in the context of performing the positive rabbinic commandment to gladden bride and groom. The consensus among authorities is that one does have to endure pain in order to perform positive rabbinic commandments. While it is unclear whether one should have to endure temporary damage for positive rabbinic commands, one should not have to endure permanent damage to this end.

The orchestra faces different halachic quandaries, resulting from the prohibition of damaging another individual. Halacha treats deafening another individual as a serious offense. Even less serious offenses, such as noise-inflicted pain, are prohibited. However, modifying circumstances such as the ability of the victim to pardon offenses may mitigate some or all of the halachic concerns. Nevertheless, one should consult a competent rabbi for definitive halachic ruling.

In view of these considerations, we should consider the phenomena of damage caused by loud music. Arguably, music would be enjoyable if played at safer levels and still fulfill its mission of bringing joy to the celebrants.

A Note On Talking During Davening

By Rabbi Dr. Aaron Levine

When our actual conduct belies or contradicts our ingrained beliefs, we usually experience guilt and anxiety. Psychologists call this phenomenon cognitive dissonance. A disturbing exception to this phenomenon is our practice of talking during davening. We apparently are quite content to live in a paradox. This is so because we are fully aware that “talking during davening” is very wrong and at times even odious. Yet, despite our knowledge, we feel no guilt or anxiety when we engage in this conduct.

In his widely read and influential article in this journal, Dr. Irving Levitz addresses this paradox and provides us with some keen insights into why we talk during davening and how to foster the cognitive dissonance we desperately need to end or at least significantly mitigate this conduct.¹

To understand the phenomenon of “talking during davening,” we need to go back to the origin of the institution of the Synagogue. The key here is that the synagogue was never just a *bet tefillah*. From its very origins, it was also an institution of *chesed* and a place where one could find social camaraderie. Recall the Great Synagogue of Alexandria. It featured homogeneous groupings for the various crafts.

1. Irving N. Levitz, “Talking During Tefillah: Understanding the Phenomenon,” *The Journal of Halaha and Contemporary Society*, XXXII, Spring 1997, pp. 95-121.

Goldsmiths had their section. So did silversmiths, blacksmiths and weavers.² (Today, I'm sure they would add a section for Wall Street traders and another one for journalists. Within this homogeneous seating arrangement, imagine the temptation during davening to "talk shop" and network).

Over the centuries, when we as a people experienced the horror of persecutions, the synagogue assumed an even greater role in providing a supportive social environment.

The rise of Hasidism in the 18th century further reinforced the social component of synagogue life. One way the movement did so, it has been suggested, was by changing the venue of prayer to a *shtibel*. Furnished with tables and benches instead of formal pews, the *shtibel* enabled and encouraged easy social interaction.³

To ensure that we feel as little guilt as possible for violating the laws of synagogue decorum, many avoid delving into the minutiae of the laws of the synagogue. Indeed, ignorance is bliss. The less we know, the less guilt we feel about violating those laws. It is here, through education, that Dr. Levitz finds a promising way to mitigate the problem. Giving a primary role to the rabbi of the synagogue, classes, and discussions about the laws of synagogue decorum could very well help promote the necessary guilt and anxiety for "talking during davening." Education, without the sharp edge of recrimination, can accomplish much to create a more sacred and less social environment in *shul*.⁴

Dr. Levitz's analytical framework lends itself to further elaboration. With the aim of enhancing constructive guilt and anxiety, let's review the prohibition the Torah imposed on the Levites that is recorded at the very end of *parashat Bamidbar*

2. *Sukkah* 51b.

3. Levitz, op. cit., p. 101, quoting Jacob S. Minkin, *The Romance of Hasidism*, Thomas Yoseloff Publishing, 1955, pp.321-323.

4. Levitz, op. cit., pp. 114-119.

(Numbers 4:20): “But they shall not go in to see the holy things, as they are being covered (lit. swallowed), lest they die.” That verse prohibits the Levites from gazing at the vessels of the Tabernacle whenever the vessels are not in their encasements.⁵

The root of this prohibition, according to R. Samson Raphael Hirsch, is the concern that the holy vessels should not be regarded as simply utilitarian. Instead, the Levites should realize the inner, symbolic meaning of the holy vessels. Had the Levites gazed at uncovered holy vessels, they might come to regard the vessels as ordinary material objects and lose the perception of their inner meaning.⁶

R. Hirsch’s understanding of the prohibition of the prohibition against gazing upon the vessels of the Tabernacle speaks to the thorny problem of talking during davening. In our *mikdash me’at*, the *Sefer Torah* is the central object of holiness. We should focus on its inner meaning. Perhaps, our problem is that the inner meaning of the Torah is not at the forefront of our consciousness. Instead, the *Sefer Torah* for us is mainly a ritual item indispensable for the fulfillment of communal prayer. And yes, we also adore the *Sefer Torah* because it takes considerable skill and resources to craft it and display it in its splendor.

Consider the following dramatization:

The communal prayer service reaches the point when the ark is opened and the *Sefer Torah* is removed. As the *Sefer Torah* moves towards the *shulchan*, the noise level goes up. Some congregants, in more or less a mindless state, stretch out their *taleisim* to kiss the *Sefer Torah*. Others admire the silver ornaments of the *Sefer Torah* along with its beautiful velvet *mantel*. Still others remind themselves, as the *sefer* passes their aisle, that the *Sefer Torah* was computer-checked and, at a cost

5. Rashi, *Bamidbar* 4:20.

6. R. Samson Raphael Hirsch, *The Pentateuch, Bamidbar* 4:20.

of \$50,000, was crafted by the best scribe in Israel. The public reading will go smoothly, they think, and with a good measure of *hiddur mitzvah* to boot. Since the *Sefer Torah* perceives both the noise and the thoughts of the congregants as it makes its way to the *bimah*, we hear the *Sefer Torah* weeping and sobbing:

Why are you talking and not showing me the reverence and awe I deserve. Don't you know I have been around two thousand years before your world was created?⁷ The Almighty glanced upon me and with one brief glance created the world you live in.⁸

Recall the high drama that occurred when Moshe Rabbeinu ascended to heaven to take me down to you. No less than a host of angels aggressively converged upon him and begged *Hashem* to keep me in the heavenly sphere and not to release me to mortals. *Hashem* then told Moshe, "You'll have to come up with an answer." Moshe Rabbeinu summoned the necessary resourcefulness to answer the angels by showing that both the mitzvot contained in my text and the historical experiences I record are relevant for you, and not for angels. The clincher came when Moshe proclaimed to the angels: "Do you, then, have an evil inclination (so that you need me as an antidote?)".⁹

Just imagine what you would be like without me. You would be nothing but a crass, brutish being. Your ambitions would be directed at nothing more than self-gratification. Your concept for nobility toward your fellow and benefaction for the community would be pathetic, to say nothing about your aspiration for spiritual growth in Torah study. Without me, you would be no

7. *Zohar* 159; *Bereishit Rabbah* 5:2.

8. *Bereishit Rabbah* 5:2.

9. *Shabbat* 88b-89a.

more than a notch above the animal kingdom. With me, you can soar higher than angels.¹⁰ All this should leap forward when each *oleh* recites the two *berachot* over me: *asher bachar banu mi-kol ha-ammim* and *vechayyei o'lam nata be-tochenu*.

At Sinai when *Hashem* gave me to you, the whole world stood in rapt attention. The oceans and seas produced no rustling waves, and no bird chirped.¹¹ Where is that awe?

In an oft quoted dictum, the *Zohar* proclaims: “Everything depends on *mazal*, even a *Sefer Torah she-bahechal* (i.e. that is in the holy ark).”¹²

What this dictum apparently says, avers *Divrei Yoel*, is that the selection of a particular *Sefer Torah* from the Holy Ark for use in a public reading of the Torah is all a matter of good *mazal*. This is so because all the *Sifrei Torah* in the ark are presumably in a state of readiness to be taken out and used for the public reading. Which *sefer torah* ends up being used for is therefore a matter of good *mazal*.¹³

The above interpretation, *Divrei Yoel* points out, is incorrect. If this were the meaning of the *Zohar*, the dictum should have said *min-ha-hechal* (from the ark) and not *she-bahechal* (that is in the ark). What the *Zohar* is therefore asserting is that the good *mazal* belongs not to the *Sefer Torah* that was selected for the public reading, but rather the good *mazal* resides with the *sifrei torah* that are left behind in the holy ark. Why? To be sure, when a particular *Sefer Torah* is selected from the holy ark for the public reading, the *Sifrei Torah* left behind are hurt because they were rejected. But, then their assessment changes as they observe the disrespect the selected *Sefer Torah* suffers

10. Psalms 8:6.

11. *Shemot Rabbah* 29: 20, 2.

12. *Zohar, parashat Nossa* 134.

13. R. Yoel Teitelbaum (Hungary, Brooklyn, 1887-1979), *Divrei Yoel Al ha-Mo'Adot*, volume 3, p. 695..

as it makes its way to the *shulchan*. Then they feel that the good *mazal* resides with them because they were spared the degradation that the selected *Sefer Torah* experienced.

For cognitive dissonance to ameliorate the problem of talking during davening, *yirah*, or awe, must be felt in shul. When Abraham's attribute of *hesed* combines with Yitzchak's attribute of *yirah*, *tiferet*, i.e., beauty, the attribute of Yaakov, is produced.¹⁴ *Tiferet* not only optimally fuels cognitive dissonance, but redefines *chesed* as far as shul decorum is concerned. Now, the attribute *chesed* screams out: "Please don't initiate a conversation with your fellow." If everyone heeds this call, there will no talking during the davening.

14. For the notion that Yaakov's character trait of *emet* or *tiferet* represented the synthesis of the character traits of Avraham (*chesed*) and Yitzchak (*yirah* or *gevurah*), Cf. R. Eliyahu Dessler, *Michtav M'Eliyahu*, vol. 2, pp. 160-172.

Letters

To the Editor,

Rabbi Lebowitz's article on co-education brings a rather important issue to the forefront and strives to be nuanced and balanced. While he states clearly before his section of the halachic issues that the classical sources do not deal explicitly with the issue of co-education, I feel like they are still being somewhat taken out of context for them to be applied to the specific issue. While they do make it clear that *Chazal* saw a value in not having the sexes mingle too much, they paint a very broad picture that, if one just takes at face value, would have much wider implications. They seem to suggest a general society where the sexes are constantly being separated as an ideal, an ideal to which I very much doubt Rav Lebowitz would subscribe.

The same *Shulchan Aruch* that he quoted continues that if one sees a woman in the street, one should run to the side. I imagine that few readers of this journal would think that this is a practice that is correct for the society in which we live.

The famous Gemara in *Succah* about *simchat beit ha'shoeva* could just as well be used to suggest that buses or supermarkets should be separated, an idea that some segments of Orthodoxy embrace, but many others would consider unhealthy. Rav Lebowitz tries to deal with this last point in footnote 13, by limiting this application of separating sexes to situations involving mitzvot. However, if we were to apply this ideal of separation to all mitzvot, why does the *Levush* permit *sheva brachot* in a mixed setting? Even the *Meiri* (80b) which does deal with schools, gives the reason that we want to prevent boys and girls talking to each other. This would suggest that we curtail all mingling of the sexes, not just schools, an idea that even many people who favor separate schools might find objectionable in our society.

Basically, we live in a different society than the one being described then, and the way in which men and women interact has changed. This being the case, one can not just apply these *mekorot* to specific situations, while admitting that in others their application needs to be modified.

I know that Rav Lebowitz raises the idea of being *mekail* (lenient) because of the *pritzut* in the street (for many more sources, see the discussion about habituation in *Tradition* Fall 2000), but I think this is an unnecessarily negative spin. Those sources are saying that society has changed (at least the *Levush* is) and not that in a perfect world we would live as they did in the "good old days", but rather that the way sexes interact has changed, in many ways in a healthy way, and we need to apply halacha to our society accordingly.

I would also caution against equating all of the *poskim* that are quoted. While they are all Torah giants and need to be taken seriously, many would advocate for much broader separating of the sexes than just having separate schools. As such, if one does not agree with them in the broader sense, it is not intellectually honest to simply quote them in a narrow case.

Finally, in terms of the Rav, I certainly understand why one would be cautious about getting involved in the varying oral reports of his position. However, the Rav's view of what would be considered an inferior education needs to be taken into account. In his letter about teaching women Gemara (published in *Community, Covenant and Commitment* p. 83), the Rav clearly advocates a policy of serious Gemara education for women. The only separate school that I know of in America that does give women the same Gemara opportunities as afforded to women in coed schools is Maayanot in Teaneck, a model that has, sadly, yet to be copied. Given that reality, the Rav's argument for allowing coeducation to prevent an inferior education still holds true.

In general, I would think that this is an issue much better

dealt with as a question of Torah values and, as Rav Lebowitz said, knowing your community, than as a halachic issue which can be read out of the *Shulchan Aruch*.

RABBI YAAKOV BLAU
Teaneck, NJ

(I am a rebbe in the Frisch Yeshiva High School, a coed school.)

* * *

Rabbi Aryeh Lebowitz responds:

I am grateful to Rabbi Blau for sharing his insights and comments on my article about the Torah perspective on coeducation. I know Rabbi Blau to be an outstanding educator, and a sincere and honest person who undoubtedly writes *l'sheim shamayim*. In the spirit of "*et va'heiv b'sufah*", as well as "*lo taguru mipnei ish*," that occasionally demands taking bold and perhaps unpopular positions particularly to uphold what one believes reflects traditional Torah values, I would like to respond to the many points raised in Rabbi Blau's letter. For the sake of clarity, I will respond to the points in the order that they were raised, and *not* in their order of importance.

It should be clear to the reader that circumstances in communities differ from one another and can easily lead to variant conclusions. As I noted in the article, one Rosh Yeshiva remarked that "there is a different *Shulchan Aruch*" for New York than there is for schools in smaller Jewish communities. The present discussion is limited to the specific issue of whether coeducation, isolating all other communal, personal, and educational concerns, can be viewed as an ideal in Jewish education.

A. Rabbi Blau argues that the early sources that discourage mingling of the genders cannot be applied specifically to a contemporary educational setting. While I agree that none of these specific sources ought to be applied to prohibit

coeducation categorically, they do form a definitive indicator in understanding the attitudes of *Chazal* toward unnecessary mingling of the genders in different contexts. As I pointed out in the article, all of these sources were cited by leading *poskim* to provide perspective on the traditional Torah view of coeducation.

B. Rabbi Blau cites the halacha in *Shulchan Aruch* prohibiting walking behind a woman as an example of how societal changes render the approach of *Chazal* and *Rishonim* toward issues relating to women antiquated.

In fact, leading *poskim* have dealt with the specific issue of walking behind women and have explained why it is no longer practiced in its original sense. The *Leket Yosher* (authored by a student of R. Yisroel Isserlin, the *Terumat HaDeshen*) writes that "one may certainly walk behind the wife of a Torah scholar or his mother because nowadays we are not too careful about walking behind women." Rabbi Shlomo Zalman Auerbach (Responsa *Minchat Shlomo* I:91:23) explains that the halacha not to walk behind a woman addresses a society where it is rare to find a woman walking in the street. Indeed, the precise language employed by the *Gemara* and *Shulchan Aruch* (*Even Haezer* 21:1) is that if one "encounters" a woman ("*paga*"), implying that it would not be the norm. The logic for the halacha is that when one is next to or in front of a woman he will be embarrassed to look at her because she will notice his gaze. When he is behind her, though, he will not be embarrassed to stare at her because she will not realize what he is doing. Considering the amount of women in the streets today, Rabbi Auerbach argues, this halacha is totally inapplicable. When one is in a street with many women, moving from behind one woman will only succeed in placing you behind another.

Societal changes, the futility of "crossing the street" for example, do not abrogate the halachic principle but adjust its practical application. While many *poskim* seek to justify the common practice of walking behind women, in all of my

research I was unable to find a single *posek* who ruled in a similarly broad fashion in the realm of coeducation.

C. Rabbi Blau compares coeducational schools to supermarkets and buses. This comparison is puzzling. Obviously, there is a difference between seeing a person in the street as opposed to a context where extended and meaningful relationships develop. Do people commonly develop an ongoing relationship with random strangers who happen to be with them on the subway or in the supermarket line? How often does somebody send a text message to the man in the produce aisle? By contrast, students who attend classes together each and every day naturally develop close relationships.

One may argue that the student who interacts with members of the opposite gender is better able to develop positive social interactions and is thus less likely to engage in inappropriate behavior. *Chazal*, however, reached the opposite conclusion. While the Gemara in *Kiddushin* (81a) permits one to be alone with a married woman when her husband is in the city, such permission is not extended to one who is accustomed to being with that particular woman ("*gas bah*"). Apparently, the danger of sexual impropriety *increases* with familiarity, and inhibitions are more easily overcome, when people are already acquainted.

While in the workplace one is obliged to interact with the opposite gender, one can assume that an adult is better prepared to uphold standards of halachic conduct than a teenager.

D. Rabbi Blau notes that the context of mitzvot cannot be viewed more severely than other contexts, as the *Levush* permits mixed seating at *sheva berachot*. To clarify, I never intended to distinguish between settings of a mitzvah and other social settings. My intention was merely to associate settings where a spirit of holiness and elevated spiritual sensitivity are necessary, such as the *Simchat Beit Ha'shoeva* and a yeshiva (see *Tosafot Bava Batra* 21a s.v. *ki*). Also, the

Levush is not alone in allowing mixed seating in certain settings. Rav Moshe Feinstein (as well as many earlier *poskim* – see *Journal of Halacha and Contemporary Society* XXXV) permitted mixed seating at weddings, and he marshals support for this position from passages in the Talmud (which he clearly does not consider to be antiquated). Rav Feinstein does not address why he prohibits coeducation while permitting mixed seating at weddings, because the distinction is obvious. A wedding does not afford the opportunity for constant contact between the sexes, and relationships generally do not develop beyond cordial polite conversation. (Even then, my experience has been that people at the table tend to spend the majority of the time conversing either with their own spouses or people of the same gender). In a school (or camp) setting, on the other hand, relationships develop, and frequently grow to a point that the halacha considers inappropriate. (I am assuming that all would agree that *negiah b'derech chibah* – affectionate touching – and inappropriate gazing are halachot in the *Shulchan Aruch* which still apply in modern times. If we cannot agree on these points there is no common ground between us on which to debate.).

E. Rabbi Blau suggests that the *Meiri*, which prohibits coeducation on the grounds that boys and girls will talk to each other too much, cannot be applied to modern times where frequent social interaction is to be encouraged. I don't understand the premise. While there is no doubt that "many people who favor separate schools might find" preventing boys and girls from socializing to be "objectionable", the halacha clearly and unequivocally has a different view. From the comment of the Mishnah to avoid speaking excessively to women, to the rulings of all contemporary *poskim*, the tone and content of rabbinic literature suggests to limit interaction between boys and girls. I do not believe that individuals with sensibilities that are not informed by a Torah perspective can alone impact educational decisions of this magnitude.

F. Rabbi Blau argues that the way in which men and women

interact has changed for the better, and the halacha should therefore respond with a more permissive attitude toward such relationships. I do not know of any evidence to suggest that our society is less sexually charged than it had been in the past. It seems to me that women are *more* objectified in our culture than ever before. Therefore, if anything, the risks are greater in taking a too-permissive attitude. To suggest that man's sexual desires can be more easily controlled in our day and age than in the days of *Chazal* seems to be an argument made from idealism rather than reality.

G. Rabbi Blau argues that those sources who adjust certain halachot based on the *peritzut* we find in the street do not view the change in culture toward *peritzut* as a necessarily negative development. I simply have a different reading of the sources, and find it hard to believe that these societal changes were embraced by the *poskim* (see, for example, *Aruch Hashulchan Orach Chaim* 75:7 who states "and now let us scream about the indecency of our generation in our many sins, that it has been many years that daughters of Israel have breached the boundaries of this sin and go with exposed heads. All who have screamed about this have not helped. Woe unto us that this has happened in our generation!").

H. Rabbi Blau suggests that it was "not intellectually honest" to cite *poskim* whose views on many other issues would not be accepted by many communities. Aside from the impossibility of writing a thorough halachic article without quoting any *chareidi* rabbis, I found the implication that there are more modern *poskim* who would look favorably at coeducation to be highly inaccurate. One of the most remarkable points about this topic is that although they vary in the degree to which they discourage it, rabbis ranging in *hashkafic* outlook from Rav Aharon Kotler to Rav Aharon Lichtenstien, from Rav Shmuel Wosner to Rav Shlomo Aviner, all maintain similarly negative views on coeducation as an ideal. Indeed, I could not find a single recognized rabbinic authority who was willing to "go on record" endorsing coeducation as an ideal. Thus, the

accusation of intellectual dishonesty seems to be pointing in the wrong direction.

I. Rabbi Blau argues that Rav Soloveitchik held the need for women to be educated at the highest possible levels to be paramount. Rabbi Blau correctly identifies one of the very few single gender schools which actually live up to Rav Soloveitchik's high demands for women's education. Rav Soloveitchik's view of women's education is something that he spoke and wrote about very publicly, leaving no doubt as to his personal position. Nevertheless, two critical points are in order: First, many of the single gender schools do not provide high level Gemara classes for girls, not because they are unable to do so without coed classes, but because they do not want to. Rav Soloveitchik's opinion, formidable as it is, was disputed by other authorities, many of whom are followed by these schools. It is unfair to suggest that the failure of girls' schools to provide high level Gemara education is owed to the fact that there are no boys in the Gemara classes. Second, while coed schools may level the playing field between boys' and girls' Gemara learning, this is often achieved through decreased standards for the boys rather than increased standards for the girls. As Rav Lichtenstein notes "the aspiration for *yirat shamayim* and for *lomdut* – that is what a 14, 15 year old has to have on his mind. He's got more of that on his mind in a non-coeducational school than in a coeducational school."

Of course, as I wrote in the article, each community has to make its own decisions based on its unique set of circumstances. I would never, God forbid, criticize any institution where Torah is taught sincerely and decisions are made based on the guidance of competent rabbinic and educational leaders. One should also be wary of generalizing from the perspective of an educational setting involving the development of our next generation to other business and community settings.

In closing, I would like to thank Rabbi Blau for reading my

article and for providing his insights. I certainly appreciate the opportunity to clarify these issues. I hope that the unbiased reader will appreciate the views of major rabbinic leaders on this important issue. I wish Rabbi Blau continued *hatzlacha* in his efforts to be *marbitz Torah* to *Klal Yisroel*.

* * *

To the Editor:

Rabbi Dovid Cohen is to be commended for an impressive job of succinctly summarizing the complex laws of *shemittah* as they relate to the US consumer in his article in the Pesach 5768 issue. Permit me to make a few comments regarding this subject.

On pages 11-12, Rabbi Cohen highlighted two changes regarding the *heter mechirah* this year. His first point, that the sale was performed only for farmers in desperate need, seems to be an error. According to the overseer of the sale and the chairman of the Israeli Chief Rabbinate's Council for *shemittah* 5768, Rabbi Ze'ev Weitman, the farmers were initially informed about the methods of fully observing *shemittah* and encouraged to do so. Those who said that they did not intend to do so were signed up for the sale, with no test of financial need being applied.

More importantly, in addition to the two changes cited, a third, very significant, change took place this year that greatly curtails the ability to draw any conclusions from previous *shemittahs* regarding the validity of this year's *heter mechira*. There were very significant improvements in all aspects of the procedure that were instituted by Rabbi Weitman (world-renowned *talmid chacham*, *posek* of Tnuva, and head of the Israeli Chief Rabbinate's 5768 *shemittah* committee) that greatly upgraded the halachic standards of the *heter mechira*. Thus, this year the *heter mechira* has much stronger validity than those of previous *shemittahs* and included the overwhelming majority (>95%) of vegetable farmers in the country. As usual, a less rigorous "backup" sale was also carried out on the rest of the

Land by Rabbi Avraham Yosef, son of Rabbi Ovadia Yosef. Thus, the ramification of Rabbi Cohen's first point (top of page 12) would appear to be entirely moot.

On page 23, Rabbi Cohen stated: "This issue is particularly relevant to Jews in the diaspora who choose to use an *Ethrog* from *Eretz Yisrael*." Unrelated to *shemittah*, the *Aruch Hashulchan* (OC 648:29) wrote regarding the choice of the source of one's *arbah minin*: "Therefore any Jew with a little fear of God in his heart will use only Israeli etrogim. And will we not be ashamed and embarrassed when there is a mitzvah we can fulfill with a fruit from our Holy Land and we will take specifically from another land. *Oy* to the shame! *Oy* to the disgrace! And on this the verse said 'and they rejected the beloved Land' " [Psalms 106:24].

The above are specific points, the "trees". I think that it is important to look at the "forest" as well, and that there is an important concept that needs to be expressed. As believing Jews, we continually strive to imbue our lives with *kedusha*, holiness, and to surround ourselves with *kedusha* whenever possible. This may find expression by frequenting places of *kedusha* such as shuls, *batei medrash*, and the Land of Israel, making the most of holy times such as Shabbat and *yom tov*, and placing ourselves in the presence of our holy sages. It also used to mean consuming holy food such as *teruma*, *challah*, and *kodshim*. We today are unfortunately unable to eat any of these items. The one and only opportunity we have at present to eat items with *kedusha* is the consuming of *kedushat shevi'it* produce. So while Rabbi Cohen may be technically correct when he states on page 15 that "there is no obligation to eat *shemittah* produce" in that many authorities see no obligation to eat any particular item, a mitzvah may indeed be fulfilled when one eats *kedushat shevi'it* produce (Ramban, *hashmatot* to *Sefer HaMitzvot*, Mitzvah 3, as explained by *Megillat Esther*). And even in the absence of a formal obligation, it is certainly a wonderful opportunity and privilege to partake of products with *kedusha*.

Because Rabbi Cohen's article was intended to "focus primarily on those aspects of the laws of *shemittah* which relate to persons living outside the Land of Israel" (page 5) it is worth noting that even for Jews who do not yet reside in God's Chosen Land this opportunity will still exist. Rabbi Cohen noted (page 8) that post-*biur* the produce retains its *kedushat shevi'it*. Indeed, while Rav Shlomo Zalman Auerbach (*Ma'adanei Aretz, Kovetz He'arot*, 8:20) leaned towards there being no *kedusha*, he remained undecided, and the Rash, Rosh, and others (see *Shabbat Ha'aretz* by Rav A.I. Kook, Chapter 7, halacha 3, *Tosefet Shabbat*, and note 18 in the 5753 edition) ruled that the *kedusha* indeed departs, the practice is to continue to treat the produce with *kedusha*. However, according to the Ridbaz, post-*biur* one prohibition is lifted – the ban on export. Thanks to Rav Weitman's Herculean efforts, 95% of this coming year's Israeli wine (as well as a large percentage of the fruit orchards) will be under *Otzar Beit Din* and thus have *kedushat shevi'it*. And following the *zman biur* next *erev Pesach*, that wine will be available for export – *kedusha* and all – permitting *galut* Jews the rare opportunity, according to most opinions, to taste *kedusha*.

RABBI ARI ZIVOTOFSKY

The Journal of Halacha and Contemporary Society

Number LVI

Succot 5769

Fall 2008

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Typeset and Printed by

STAR COMPOSITION SERVICES, INC.

118 East 28 Street Room 505 / New York, NY 10016

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